Music Copyright, Creativity, and Culture

JENNIFER JENKINS

Second Edition

MUSIC COPYRIGHT, Creativity, and Culture

Jennifer Jenkins

Graphic novel excerpts designed by James Boyle
and Jennifer Jenkins and drawn by Ian Akin
and Brian Garvey

SECOND EDITION

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Contents

ACKNOWLEDGMENTS i

ABOUT THE BOOK vii

OVERTURE xix

Music **xix**
Musicland: A Thought Experiment **xx**
The Reality: Copyright! **xxiv**

CHAPTER 1 How Did We Get Here? 1

1.1 Anita, Barry, and Calandra **1**
1.2 The "What" and the "Who" **3**
1.3 The Layers of History **10**

CHAPTER 2 Introduction to Copyright

2.1 Promoting the Progress **25**
2.2 Moral Rights? **28**
2.3 Intellectual Property **29**
2.4 Musical Borrowing **30**
2.5 Control and Freedom **38**
2.6 The First Copyright Laws **43**
2.7 The Exclusive Rights **44**
2.8 The Copyright Term **49**
2.9 Copyright's Practical Reach **49**
2.10 A Music Copyright Timeline **50**

CHAPTER 3 A Tale of Two Technologies **57**

3.1 "A Marvelous Change" **57**
3.2 The Compulsory License for Recordings **65**
3.3 Separate Copyrights over Recordings **68**
3.4 Radio Ga Ga **73**
3.5 The "Blanket" License for Performances **78**

CHAPTER 4 Owning Music **83**

4.1 Sources of Copyright Law **84**
4.2 A Copyright Infringement Flow Chart **86**
4.3 What Do You Own? **89**
4.4 How Do You Get a Copyright? **97**
4.5 What Does Copyright Cover? **98**
4.6 Originality **99**
4.7 The Idea/Expression Dichotomy **104**

4.8 Scènes à Faire **105**
4.9 What Are Your Exclusive Rights? **107**
4.10 There's Something about Music . . . **108**
4.11 What Is Music? **111**

CHAPTER 5 Musical Echoes **119**
5.1 Coincidence or Copying? **119**
5.2 Inspiration or Theft? **127**
5.3 Fair Use **133**

CHAPTER 6 Subconscious Copying **149**
6.1 Paul McCartney and "Yesterday" **149**
6.2 Three "Subconscious Copying" Cases **151**
6.3 A Factual Inference **159**
6.4 Proving an Unknown **161**
6.5 Recalibrating the Balance? **164**

CHAPTER 7 Blurring the Lines **167**
7.1 "Got to Give It Up" v. "Blurred Lines" **167**
7.2 The Appeal **174**
7.3 A Cautionary Tale **175**
7.4 Theory and Practice **177**
7.5 Is There a "Text" in This Courtroom? **179**
7.6 Musical "Constellations" **181**
7.7 Fine-Tuning the Analytical Comparison **186**

CHAPTER 8 Moving the Needle **189**
8.1 "Taurus" v. "Stairway to Heaven" **190**
8.2 Keeping Building Blocks Free **193**
8.3 Grappling with Musical Combinations **195**
8.4 Permissible and Impermissible Borrowing **197**
8.5 "Joyful Noise" v. "Dark Horse" **200**
8.6 What's in an Ostinato? **201**
8.7 This Ostinato Isn't Copyrightable **203**
8.8 Have We Seen the High Water Mark? **206**
8.8.1 Ed Sheeran Prevails **208**
8.8.2 Dua Lipa defends "Levitating" **213**
8.8.3 "Flowers" and "When I Was Your Man" **214**
8.8.4 Reggaeton on Trial **215**
8.9 What about Access? **217**

CHAPTER 9 Sampling and Hip Hop **223**
9.1 The Birth of Hip Hop: A Back-to-School Party? **224**
9.2 Hip Hop's "Golden Age" **225**

9.3 Putting the Brakes on Breaks **229**
9.3.1 *Grand Upright* **242**
9.3.2 *Bridgeport* and *VMG Salsoul* **243**
9.3.3 "A logical fallacy"? **245**
9.4 Beyond the Law: Creativity or Theft? **250**

CHAPTER 10 Sample Clearance and 2.0 **259**
10.1 The Market That Wasn't: Sample Clearances **259**
10.1.1 "We Had To Change Our Whole Style" **263**
10.1.2 Whose Song Is This Anyway? **267**
10.1.3 The Artistic Community **270**
10.2 A Summary and a Solution(?) **273**
10.3 Sampling 2.0 **279**

CHAPTER 11 Creative Destruction **287**
11.1 "Creative Destruction in Real Time" **288**
11.2 Secondary Liability for Infringement **295**
11.3 The Digital Millennium Copyright Act **302**
11.4 Tangled Up in Licenses **309**

CHAPTER 12 The Music Streaming Era and AI **315**
12.1 The Streaming Economy **318**
12.2 Tapping the Streams **319**
12.3 "Hard Way to Make an Easy Living" **324**
12.4 A Celestial Jukebox **330**
12.5 How All of This Shapes the Music. . . **340**
12.6 From Bored Apes to Soundscapes **341**
12.7 AmaDeus Ex Machina? **343**

CHAPTER 13 Music, Copyright, Racial Justice **361**
13.1 "Lingua Franca of American Music" **362**
13.2 Structural Biases in the Law **365**
13.3 Exploitation and Appropriation **368**
13.4 Architects of American Music **375**
13.5 Segregation **392**
13.6 Harmony **401**

CODA
Hidden Choices **405**
The Economics and Law of Intangible Property **406**
Reality Is Interdisciplinary **406**
Conclusion **407**

Questions for Class **409**
Glossaries **415**
Further Reading **419**
References **427**

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The *sine qua non* for this book is my wonderful husband, Jamie Boyle. Many chapters owe their origins to one of our morning walks or kitchen conversations. Thank you for being my inspiration and sounding board, nudging me out of writer's block, reading through so many drafts, and making this project possible.

This book grew out of a 25-year fascination with music and music copyright. As someone who used to spend countless hours playing the piano, I can appreciate the bewilderment that many musicians feel when first encountering copyright law. As a copyright nerd, I obsess about legal minutiae in the hope of making the system function better. As someone who has followed this field through cycles of technological change – from the World Wide Web in the 1990s to generative AI now – I am struck by the complex minuet the law dances with technology. This book is being published at what feels like an inflection point for music copyright law: even though music copyright has existed since 1831, three of the most significant court decisions in the field were decided in just the past few years. The legal and economic system has barely adjusted to the streaming economy, while AI is poised to trigger a fresh round of change. In other words, if you wanted to study disruptive innovation in art, law, and economics, now is a very good time.

One of the book's themes is borrowing, and in writing it I am "standing on the shoulders of giants." Many scholars—Jamie included—have informed my thinking over the years. Here are just a few of the people whose work has informed and influenced me. I will inevitably forget some inspirations, and I apologize for those omissions. For a longer list of resources, please consult the Further Reading list, and for a still longer ledger of sources for each chapter, please see the Endnotes.

The scholarly loam for this book was the interdisciplinary literature on music, copyright, and technology from the legal academy, musicologists, economists, and others. The book's first chapters are indebted to Michael Carroll's articles about the preconditions for and history of music copyright and to Frederic M. Scherer's account of music's gradual transition from patronage to a market-oriented system. As the Musicland thought experiment indicated, copyright is not the only incentive system for encouraging musical production, and many legal scholars have examined the role of non-economic incentives. These include Yochai Benkler, who has written prodigiously about the role of the commons-based production on the internet, Jessica Silbey, whose work includes extensive interviews with creators, and Rebecca Tushnet, who writes about the "economies of desire."

Duke professor Anthony Kelley taught me about musical borrowing and supplied lasting insights into composition and theory. J. Peter Burkholder's magisterial works on the subject provided invaluable and comprehensive guides to musical borrowing and the history of Western music. (Those books were often written with Donald Jay Grout and Claude V. Palisca). One of my favorite stories of borrowing is the 100-year long story behind a protest song that James Boyle recounts in his book *The Public Domain.* Boyle and others have

illustrated the disconnect between such traditions and copyright's increasingly restrictive rules. This theme was explored in foundational work by Lawrence Lessig, Siva Vaidhyanathan, and Kembrew McLeod, and I have returned to their books many times over the years.

Turning to the intricacies of applying copyright to music, I am thankful for a wealth of thoughtful and thorough explorations. Joseph Fishman draws on his background in both law and musicology to address the central question of how we set the metes and bounds of a musical work. He concludes that while copyright's historic focus on melody represents a "myopic view of what makes music creative," it may be preferable in the context of copyright litigation—among other things, it would shield against the kinds of exaggerated claims of non-melodic similarity that featured in the "Blurred Lines" case. On the judicially-created test for copyright infringement, Shyamkrishna Balganesh's article about *Arnstein v. Porter* makes a persuasive case for revisiting its canonical status. Mark Lemley – an especially prolific and influential scholar – offers a convincing critique of the mechanics of the two-prong test from *Arnstein* and its progeny.

Focusing on the "access" inquiry from the first prong, David Nimmer, author of the *Nimmer on Copyright* treatise, wrote a prescient piece about the need to update the concept of access in the online world. The flip side of access is independent creation, and my colleague Chris Buccafusco has argued that the independent creation doctrine has become "empirically meaningless." His arguments are powerful, although a recent case involving Ed Sheeran that I discuss in the book indicates it may not be dead yet and might even be in line for resuscitation. Regarding the second prong's "lay listener" standard, Jamie Lund conducted an empirical study demonstrating how performance elements can skew the lay listener determination. On the dearth of fair use precedent involving musical works, Edward Lee supplies an empirical study of "fair use avoidance in music cases." These authors join others, including J. Michael Keyes and Peter Nicolas, in proposing reforms that better support creativity and align with the realities of music as an art form. A special thank you to the extraordinary litigators Peter Anderson and Ilene Farkas for taking me and my students behind the scenes of landmark music copyright cases.

Both legal and musical experts have grappled with the expert musicologist's role in all of this. Chris Buccafusco and Rebecca Tushnet call for greater statistical rigor supporting experts' inferences about copying. Joseph Fishman and Kristelia García chronicle the increasing use of prior art in music cases, driven by a small but influential group of expert witnesses. Edward Lee and Andrew Moshirnia study the impact of musicologist testimony on jurors, with some counterintuitive findings. Joe Bennett advocates objective and replicable expert witness methodology, possibly managed by a membership organization, instead of dueling experts who zealously support their clients' positions. M. Fletcher Reynolds criticizes the note-counting testimony in the *Selle v. Gibb* case and wrote a doctoral thesis on music expert testimony, and Katherine Leo offers a history of forensic musicology in copyright cases.

Bennett was kind enough to visit our law school, where – illustrating the point live on his guitar – he offered a convincing argument that everything from the limited number of viable melodic transitions to the need for singers to take a breath at a certain point in the song massively constrain the universe of creative choices a composer has. Thus, coincidence is highly likely to occur when constructing a melody, an argument at odds with the way the legal system has frequently made isolated melodic fragments central to infringement cases. Other musicologists have also informed my thinking, including E. Michael Harrington, Lawrence Ferrara, and Joanna Demers, whose book about the tension between copyright enforcement and artistic freedom has been on my shelf since 2006.

To understand the intersection of music, copyright, and race, I turned to the excellent scholarship by Olufunmilayo B. Arewa and by Kevin J. Greene. Their work has defined the field and you can find citations to their articles in the Further Reading section. Duke professor Mark Anthony Neal has also written extensively about Black music and Black popular culture. Additional thanks to Robert Brauneis for his thoughtful analysis of the history of "mirror cover" recordings that featured white performers imitating Black artists without compensation or attribution.

Two other music copyright articles from Brauneis also stand out: a masterful feat of detective work that led to a judicial confirmation that the "Happy Birthday" song is in the public domain, and a compelling and comprehensive argument for eschewing the ©/℗ framework discussed throughout this book. To unpack copyright's many conundrums, I have also relied on the work of many other legal scholars. I return often to Pam Samuelson's writings, particularly her articles on the derivative work right and statutory damages, which are mainstays in my classroom. Jessica Litman's book remains my go-to for understanding the legislative process behind digital copyright law. My thinking on copyright has also benefited enormously from the work of Jeanne Fromer, Chris Sprigman, Neil Netanel, Peter Menell, and William Patry, and my take on music copyright has been enriched by conversations with Christopher Bavitz and George Howard.

This book focuses not only on copyright's rules but also on the licensing regimes, contractual arrangements, and business practices that are layered on top of them. Donald S. Passman's *All You Need to Know About the Music Business* is referred to as the music "industry bible" for good reason—it is rich in both detail and humor, and I am perennially grateful for this resource. I could not have written the chapters on digital sampling and clearance practices without the work of Kembrew McLeod and Peter DiCola. Conversations with the reigning "Queen of Sample Clearance" Deborah Mannis-Gardner and with my friend the music lawyer Whitney Broussard were incredibly helpful in decoding the sample clearance process.

Lydia Pallas Loren's work on musical licensing is a must-read for anyone seeking a deeper understanding of the "web of music copyrights." Articles by Kristelia García, and her work with James Hicks and Justin McCrary, provide insight into musicians' income streams and the economic lifespan for commercial music, which is far shorter than the current

copyright term. Kevin Erickson was kind enough to share his thoughts on recording contracts with one of my students, and thus indirectly enriched my own information.

The theme of technological transformation pervades the book, and I am thankful to the many experts who have investigated this topic. Some 20 years ago, Paul Goldstein provided a magisterial account of copyright and technological change in *Copyright's Highway: From Gutenberg to the Celestial Jukebox.* Just this year, Howie Singer and Bill Rosenblatt supplied a fascinating case study of ten times that technology shook up the music industry, from the advent of sound recording technology to generative AI. Books by Mark Katz and Greg Milner furnish additional analysis of how recording technology changed music. During the file sharing era, William W. Fisher III presented intriguing proposals for alternative compensation models that could benefit creators and listeners alike. Steve Knopper and Stephen Witt later supplied illuminating reflections on that era.

My research into today's streaming economy was helped by terrific books from economists Will Page and Alan B. Krueger. I have followed Cory Doctorow's writing for years, and his recent book with Rebecca Giblin helps explain why streaming pays so little to artists and how the dominance of Spotify's playlists exacerbates power imbalances. Chris Buccafusco and Kristelia García argue that streaming pay-for-play does not cause the same harm as old-school payola. Meredith Rose details the lack of transparency and anticompetitive practices behind streaming payments. Katharine Trendacosta delineates the problems with YouTube's Content ID system. Aaron Perzanowski and Jason Schultz recount how, in the digital economy, we no longer "own" the music and other content we purchase. Casey Rae supplies a reader-friendly guide to music copyright in the digital age. Mark Mulligan and MIDiA Research offer invaluable data analysis of the music economy and predictions for the future. Cherie Hu's *Water & Music* newsletter has been indispensable in evaluating the new music business. And amidst the tales of creative destruction, Mike Masnick shows how the entertainment industry has also benefited from transformational technologies such as the internet.

Onto the next frontier: anyone seeking to wrap their mind around generative AI and copyright law should read the work of Mark Lemley on the subject—a few citations are in the Further Reading list. I also recommend the work of Edward Lee, Matthew Sag, and James Grimmelmann. These and other legal experts will doubtless have produced more scholarship on this subject by the time this book is published.

The starting point for this project was a love of music. In pondering why music affects us so deeply, I profited greatly from the excellent books by Daniel Levitin and Oliver Sacks. To appreciate "how music works," David Byrne's eponymous book is well worth a read. And to understand what goes into making a hit song, read *Switched on Pop* by Nate Sloan and Charlie Harding and listen to their podcast, and see *The Song Machine: Inside the Hit Factory* by John Seabrook.

To stay abreast of new developments, I have relied on the careful reporting from journalists Ben Sisario, Jon Caramanica, Eriq Gardner, Tim Ingham, and many others. I have spent many an hour watching videos by musicians such as Adam Neely and Rick Beato who

break down the music at issue in copyright disputes. For user-friendly legal analyses of developments in this area, see Aaron Moss's "Copyright Lately" blog.

I owe a debt of gratitude to others as well. Thanks to Garrett Levin for our discussions of copyright law and music streaming over the years. Alice Randall provided a window into the perspective of a songwriter (in addition to being the author of novels such as *The Wind Done Gone,* Randall is also a songwriter in Nashville). Sarah Rosenbaum shared background on licensing and the passage of the Music Modernization Act with my class, and Niall Fordyce confirmed my inclinations about misleading musicological analysis.

Whether or not it takes a village to raise a child, a great university makes it easier to write a book. Duke Law School is an incredible academic environment and I would like to acknowledge its support. I benefited incalculably from conversations with colleagues about law, music, aesthetics, markets, and innovation. Many of those conversations had nothing to do with this book but they left their mark nevertheless. Co-teaching a seminar with Professor Anthony Kelley of Duke's Music Department, with a class composed half of law students and half of music PhD candidates, taught me about the difficulties of translating between the two disciplines when it comes to evaluating musical borrowing and much more. Professor Kelley, himself a brilliant composer, offered a musician's perspective that was an enormous help as I developed my perspective on these issues. Duke Law School's library helped to track down hard-to-find texts, articles, and exhibits from court cases and I'd like to single out Wickliffe Shreve for his tireless work in that regard and to thank Jennifer Behrens for her support.

The precursor to this book was our graphic novel *Theft! A History of Music*, and thanks go to our dear departed friend Keith Aoki, who drew the original art for that book and participated in many hilarious and productive brainstorming sessions, and to the talented artists Ian Akin and Brian Garvey who illustrated the final version.

This book has benefited from many discussions of its themes over the years, including at Harvard University's Berkman Klein Center for Internet & Society and at the Creative Commons Global Summit, where we presented that earlier graphic novel. It also benefited from the discussion of its final chapter in Professor Mitu Gulati's "Identity, Law, and Politics" seminar at the University of Virginia. I very much appreciate Mitu's support of this project. I am extremely grateful for the feedback from experts and reviewers including Jamie Boyle, Joseph Blocher, Bill Patry, Will Page, Garrett Levin, and Jennie Rose Halperin.

Many great research assistants at Duke Law School have helped with this project. Thanks to Paul Finkelstein, Hadley Dreibelbis, and Saloni Mathur for their extensive work on research, endnotes, and graphics. Parmida Enkeshafi's design savvy was indispensable. Thanks also to Sterling Dudley, Mina Li, Rebecca Reeves, Adrienne Jackson, Anastasia Bodea Crisan, and Shira Levine for their contributions. Our longtime program coordinator, Balfour Smith, now retired, colorized and lettered many of the comic book pages and did heroic work formatting an earlier edition of the book. Our superb current assistant, Taylor Clark, carried that work forward with verve and fastidiousness. I would also like to thank all

of the wonderful students who have taken my Music Copyright course for their questions and insights. While the book is indebted to many, errors are mine alone.

This book is dedicated to my amazing parents. My mother has a beautiful voice and my love of music doubtless began with her song. She drove me to countless music lessons and sat through recitals that I'm sure were less than euphonious. My father made sure I heard the music he enjoyed, running the gamut from opera to blues to rock and roll. Name a great artist performing in the 60s or 70s and I am pretty sure he has their album or even made his way to one of their concerts—James Brown, B.B. King, Janice Joplin, the list goes on. At home, I had a front seat not only to great music but also to a constantly moving history of sound recording technologies. We listened to recordings on vinyl, cassette tape, reel-to-reel, CD, and now streaming. But my parents' contribution to this book goes well beyond music. They helped to instill in me a love of language, a curiosity about how things work, and a lifelong commitment to learning. Thanks to both of them for their love and support. I hope you enjoy the book they helped to inspire.

About the Book

"The work I've taken on
Stoking the star-maker machinery
Behind the popular song"
–Joni Mitchell

"If music be the food of love, play on."
–William Shakespeare

This is a book about music copyright: about *owning* music. It can be used as a general introduction or a textbook. You have probably heard stories where one musician is accused of copying another's song. Maybe one of your favorite artists has been involved in such a dispute. By the time you finish reading this book, you will be able to tell your friends what the *law* might say about it: the lines it would draw between legitimate inspiration by shared cultural themes and outright theft that will result in substantial monetary damages. But you will know a lot more. You will have explored how a society even comes to think of music as something that *can* be owned: the cultural, technological, economic, and legal prerequisites of the system. You will have traced out the history of the great technologies that affected music, from musical notation—the invention of writing, musically speaking—through to the printing press, the player piano and phonograph, the radio, and the internet. You will have thought through how we set up incentives to make, and to distribute, the music all of us love. How can society ensure that the next great composer or performer devotes her time and talent to *that* task instead of something else? How can we set up a system that gives creators control of their work, and yet still leaves free the genres, styles, techniques, and other building blocks that make up the musical commons, upon which all artists draw?

By the time you finish this book you should be able to have an informed opinion about where we need to strike that balance, and whether the law we have today has done a good job of doing so. You will understand the legal difficulties an entrepreneur would face if they wanted to set up a new streaming service: the path they would have to take through a tangled thicket of licenses, each invented to deal with a particular technology of the past. But you will also have gone deeper. For example, we will look at the history of attempts to control music in American culture along racial lines: from the legal and social barriers that prevented African American and other minority musicians from receiving the credit and financial reward their talents deserved, to the vexed question of "appropriation," and the line between benign mutual cultural influence and unjust, uncredited exploitation. Along the way, you will get to think about the law, culture, aesthetics, and economics of an art form that touches us more profoundly than we know.

If you are reading this as a textbook, you will find that the world it describes cannot be neatly pigeonholed as a matter of law, of business, of economic incentives, of aesthetics or even of political capture of the legislative process. The incentive structure for "public goods" that are hard to exclude others from and costless to share is a concept central to economics. The history of technology provides invaluable insight about just how technological

developments get made, and what their effects are on law, culture, and ideology. The justifications for any kind of property right require one to delve into realms moral philosophers love to roam. That is particularly true when we need to draw lines, such as the line between the commons that should be open to all and that which can and should be privately owned. That question is literally the central one we consider here. The study of business strategy focuses on the ways that companies seek to compete within, or to monopolize, particular markets while dealing with disruptive innovation. As you will see, that story is central to the history of the music industry.

The history of American music is also a masterclass in America's continuing struggles over racial justice. The reality that study reveals is a disturbing, but also complex, one that is not easily captured in a tweet or a social media post. After all, music has been a focal point both for cultural appropriation and for the inspiring struggle to topple racial barriers. That struggle is central to the history of American music. Those of you who love both music theory and the history of music will find that the musicological attempt to trace lines of stylistic inspiration and appropriation parallels in many ways the same questions we deal with here. Literature and Cultural Theory grapple with the notion of authorship, which is fundamental to copyright. Political Science deals with some of the "collective action problems" that push copyright law toward results that are not always socially optimal. This book, in other words, is a nutshell encapsulation of the great world of ideas, of knowledge that is connected in unexpected ways, in order to produce the complex but fascinating result that is our collective culture.

So, how does this book tell that fascinating, complex, multi-layered story, without burying you in a pile of arcane legal terms or putting you to sleep with an endless historical narrative of facts and dates? It is, after all, a book about *the law*. Of course, the book makes use of some of the tried-and-true techniques of introductory books everywhere. Key concepts are bolded throughout, and there are pointing fingers to emphasize important points and icons that highlight an important legal rule or present a fragment of a judicial opinion about a musical case. Notable quotes or stories are emphasized in sidebars. There are timelines, infographics, and flowcharts to simplify complex series of events and questions at the end of chapters that rehearse important themes. At the end of the book there are musical and legal glossaries and a list of supplemental materials for further reading. But the book also makes use of two relatively unconventional techniques to make the subject both approachable and appealing.

First, large segments of this book take the form of a graphic novel—a comic book—about law, culture, and music. This is a comic book written and designed by scholars, based on years of research on both law and musicology.[1] The protagonists are time travelers, exploring the tangled, and sometimes troubling, history of law and music. The excerpts that you will read here will give you insights into everything from the development of music copyright in the 18th and 19th centuries, to the way that American segregationists fought a

[1] *Theft! A History of Music*, by James Boyle, Jennifer Jenkins & Keith Aoki, freely available under a Creative Commons license at https://web.law.duke.edu/musiccomic/.

battle with rock and roll, to how rap and hip hop had to navigate a legal landscape unsympathetic to the genre.

(For those of you reading this book in a class, rather than for pleasure or personal edification, you have *finally* arrived in a place where a big part of your homework is to read a comic book. Score.)

Second, throughout the book, we will revisit the contrasting views of three imaginary characters, each designed to reflect a different, but valid, perspective on the musical landscape. You will meet Anita, a brilliant songwriter who, to her chagrin, can't carry a tune, but wants passionately to make a living from music nonetheless. There's Barry, a remix artist whose instrument is his laptop and whose raw materials are recordings from the past, from great hooks taken from soul or rhythm and blues, to snatches of golden-age hip-hop, to *motifs* from classical music and great voices from country music. Barry's heavily transformed sonic collages mix all of these into something different, and often unrecognizable. His vision of what an ideal copyright system would look like is very different from Anita's. Finally, you will meet Calandra, a talented singer, who wants to scale the heights of the commercial music mountain and make a name and a career for herself in the process. Each of these characters has different ideas about the law, and the ethics, of music. Through their personal perspectives you will be able to see the competing imperatives that music copyright, and the larger musical economy, must negotiate and, hopefully, reconcile.

The goal of this book is to combine the expository text of a traditional monograph with pictorial insights a graphic novel can offer and the individual human perspectives of Anita, Barry, and Calandra; all in the service of giving you a complete, rounded, and accessible introduction to the law, history, and incentive systems behind our music.

WHY OPEN ACCESS?

This is the second edition of *Music Copyright, Creativity, and Culture*. There are a number of changes from the first edition, which was published in 2025 by Oxford University Press. The most significant to your wallet and to its general accessibility is that I have repurchased the rights from OUP so that I could make the book open access. (For those who are interested, I will explain my reasons for making this change at the end of this section.)

This edition has no affiliation with OUP whatsoever. It is now freely available online under a Creative Commons BY:NC:SA license. The details of the license can be found at https://creativecommons.org/licenses/by-nc-sa/3.0/, but in short, the license means you are free to download the book for no charge. You can copy it, share it, print it, and even modify it—for example, translating it into another language—so long as you do so noncommercially and correctly attribute the book in the way described in the license terms. If you modify it, you must identify the modifications and put your revised version under the same license, so that future readers will have the same freedoms you yourself received. The book is also available in an affordable color print edition, about which I will say more in a moment. But, from now on, the digital version will be entirely free to anyone around the world—global

open access. As my husband James Boyle has written: "The moral warrant for access to knowledge is a pulse, not a wallet."

The second major change is stylistic. The OUP print edition was black and white. This edition is available in color, both digitally and in print form. The change to color was not merely an aesthetic preference. The book includes a wealth of graphic educational material. Musical creativity is a truly fascinating and engaging topic. Yet the details of copyright law, musical technologies, and economic incentive systems can seem dry and abstract. How to jump that gap? This book draws on my earlier work to use the format of an educational graphic novel—aka "a comic book that teaches you stuff"—to cover certain selected key concepts; approximately 20 percent of the book is in this form. Now all of those pages are in color. The same philosophy informs the rest of the book as well. It includes timelines, flowcharts, diagrams of the music licensing maze, and representative icons in the margins that indicate key concepts. All of those work better in color. In each case, the result is more compelling. I invite you to scan through the book to see what I mean.

The final set of changes is substantive. Some portions of the book are largely unchanged. However, certain areas of musical creativity and copyright law are moving particularly fast; the impact of AI is the most obvious example. As a result, there are substantial changes to Chapter Twelve, which deals with some of the transformations AI has brought and will bring in the future. Chapter Eight, which deals with the recent trajectory of court decisions in lawsuits claiming basic building blocks of musical culture, has also been substantially updated with coverage of a wealth of new cases involving artists who are household names—from Ed Sheeran to Bad Bunny to Dua Lipa and Miley Cyrus. Indeed, a current lawsuit is asserting ownership of the beat running under much of reggaeton—if this claim is successful it could monopolize an entire genre. My review of the recent caselaw shows that many of the "hot takes" on our current law of music may be, at best, a little premature. Chapter Eleven is updated with a 2026 decision from the Supreme Court that appeared to rewrite the law of contributory liability for copyright infringement—now there are fewer circumstances under which technology providers are liable for the infringing activity of their users.

The dramatic changes that AI is introducing and will continue to introduce to our musical culture illustrate a deeper point, one not confined to Chapter Twelve. One of the central themes of the book is that we need to understand all of the factors that come together to shape the ultimate impacts of technological change on our world. People sometimes talk as if the introduction of technology, by itself, produces certain definite results. History shows the opposite is true. The shape that a technology takes in our lives can depend on law, culture, social morality, and even current aesthetic tastes. More likely, it depends on all of those things simultaneously.

As you will see if you read this book, before AI, the emergence of the World Wide Web (the internet came far earlier) was the last technological innovation to have the same level of disruptive and transformative effects on the music business. If one wanted to find an earlier example that had similar world-shaking effects, it might be the introduction of recorded music at the turn of the 20th century. The impact of both of those technologies was

profoundly context-dependent. Without the looming threat of a musical monopoly called the Aeolian company, the current recorded music industry might have gone in a different direction. Without the influence of everything from the First Amendment, to digital libertarianism, to the complex details of American copyright law, the development of the web could have been dramatically different. We came very close to having something closer to a cable TV service or a private electronic bulletin board. What will the equivalent forces be on the shape that AI takes in our musical world? While this book will not enable you to make perfect *predictions* about AI's eventual impact, it will, I hope, alert you to the *factors* that will steer its – and your – future.

That leads me to my final subject: the move to an open access edition. Oxford University Press is one of the most prestigious academic publishers in the world. I was grateful that they chose to publish the first edition. Why did I decide to withdraw the book from publication with them and repurchase the rights? While my experiences and goals may be idiosyncratic, I think the answers may be useful to other academics in the future.

This book is about the way the creative economy of music is structured—by copyright, technology, economic incentives, and business practices that may lag behind technological and cultural change. But academic publishing itself is also a creative economy. Dealing with that economy while writing a book about a different one yielded a number of interesting insights.

"The future is already here, it's just not very evenly distributed." This quote, from legendary science fiction author William Gibson, describes perfectly the way that patterns of innovation in any creative economy—be it music or academic publishing—are lumpy rather than smooth. Think of the pre-internet academic publishing industry. The academic press performed three primary functions: 1) selection, quality-curation, and signaling, 2) editing, design, and professional presentation, and 3) printing, advertising, and distribution of physical books. The academic press selected high-quality books, often using the labor of unpaid academic reviewers, and its selection acted as a signal of that quality to readers and tenure committees alike. Then the typed manuscript was converted into edited and professionally laid out camera-ready copy, generally relying on in-house talent, though there might be external typesetting contractors. Finally, the press had access to expensive industrial-scale printing presses and to distribution networks, from advertisements in journals to the trucks that carried books to stores and libraries.

Of these three functions, only the curation and signaling function—and potentially the role of the editor—remained largely unchanged in the digital and post-internet world. Desktop publishing tools could produce high-quality, slickly presented content. The internet allowed instantaneous, global, and almost free distribution worldwide of digital versions of the book, as well as providing numerous tools to publicize it. Print-on-demand firms even made it feasible cheaply to produce print versions of a book, and to do so without requiring large print runs. The digital manuscript could become a physical book in a matter of days, not months. Finally the development of standardized tools such as Creative Commons

Licenses made open access academic literature a possibility, allowing authors to share their work freely under terms and conditions that they chose, expressed in interoperable licenses.

Obviously academic publishing had to change and it did. But the change was uneven. Presses embraced the massive cost reduction of digital publishing but aimed, naturally enough, to keep the economic surplus thus generated to themselves rather than sharing it with their readers. Digital content was offered on "rent, don't buy" terms. Students or university libraries would find that the world of purchasing and reselling physical books and journals had been replaced by costly and restrictive, time-limited licenses. At the same time, many presses welcomed the freedom that digital content and a global editorial and proofreading workforce gave them to cut their own workforces. Why employ an expensive professional academic editor in-house, when you could instead send a digital file to a much cheaper subcontractor far away? More and more editing work was done by external firms and, later, by AI-aided systems.

Open access licenses—which had initially been regarded with horror by most academic presses—were embraced as a potential source of revenue. Authors, or their grant funders, would have to purchase from the presses the right to offer their works under open access licenses. Freedom, at a price. I do not say this to be critical. It was often a very good thing. I am in favor of both for-profit and truly free versions of open access. Still, academic presses never wholeheartedly accepted open access, even the profit-making, paid-for kind, when it came to monographs or textbooks. Instead, they consigned such works to a niche status. Libraries, for example, would buy – or more likely rent – the right to have access to large catalogs of open access content, but this would be held separate from the press's main catalog. Authors might be charged up front for the open access status, but then the books would be leased in packages to librarian intermediaries, generating a second revenue stream.

Over time, informal custom solidified into rule-like assumption, relegating most open access monographs produced by academic presses to fringe programs, most conveniently available to those who already had access to well-funded university libraries. This in turn served to undermine the hope behind open access which I quoted earlier, namely that the moral warrant for access to knowledge was a pulse and not a wallet. It also imperiled the notion that the world could be organized so that lean, profit-making firms could make a modest but reasonable return in helping to make that hope a reality.

I wear at least two hats as an academic. I am a teacher and an author. I've written or co-written articles, textbooks, and even educational graphic novels. But as the Director of the Center for the Study of the Public Domain at Duke Law School, I also work on the distribution, rather than just the production, side of things. At the Center, we offer educational material to the world, either entirely free in digital versions or in low-cost print editions. I've seen, first-hand, the reach that open access can give to academic material. Our publications have been downloaded hundreds of thousands of times, and in the case of our comic books, perhaps more. Because of the freedoms the license confers, they have also been shared, and even translated into other languages. If one cares about the impact and visibility of one's academic work, open access has undeniable advantages. But we also generate print versions

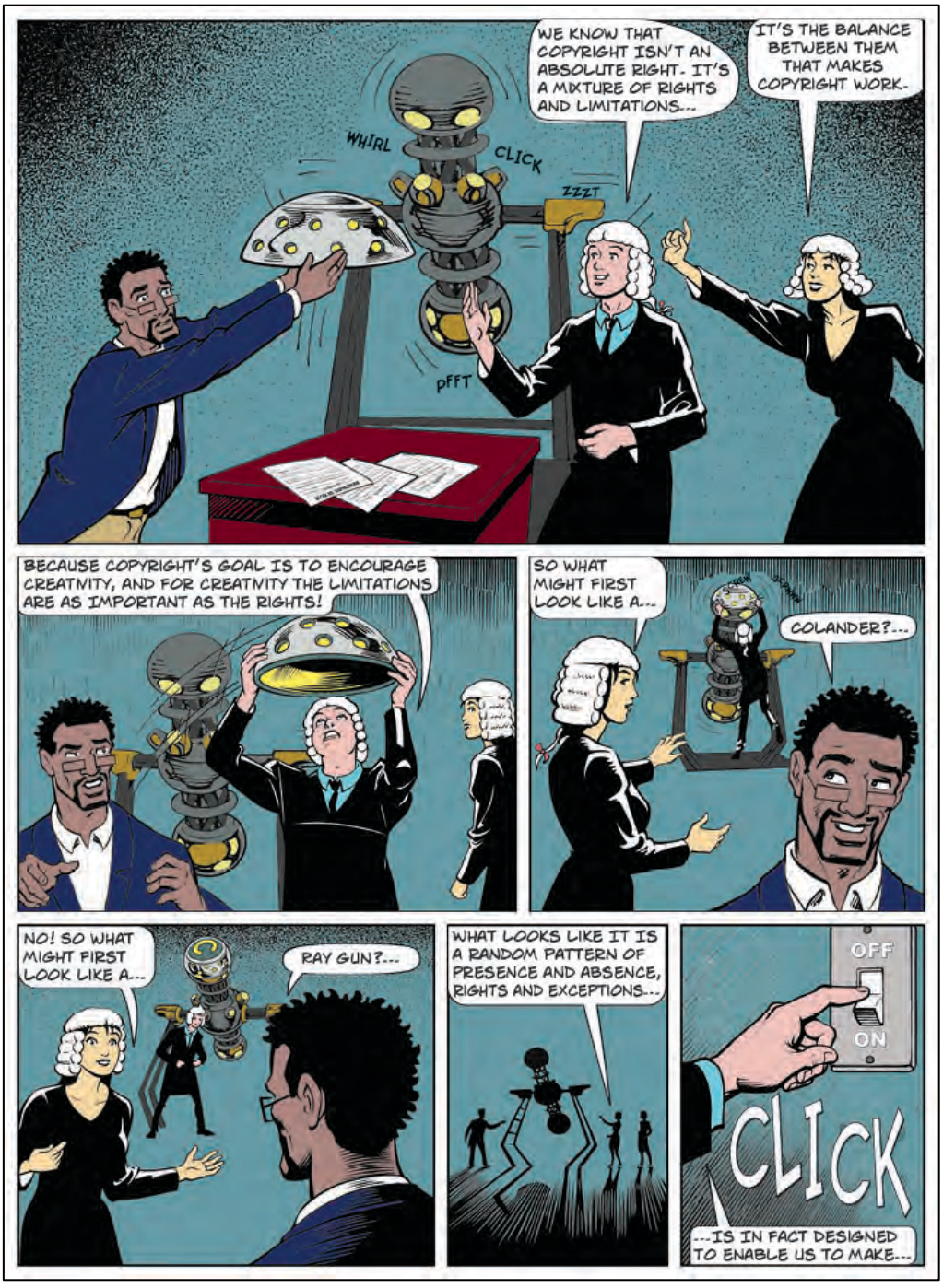
of our publications, using print-on-demand services. This allows us dramatically to lower costs. Our intellectual property casebook is free to download, of course, but it is only $35 in print when competing legal casebooks can cost over $200.

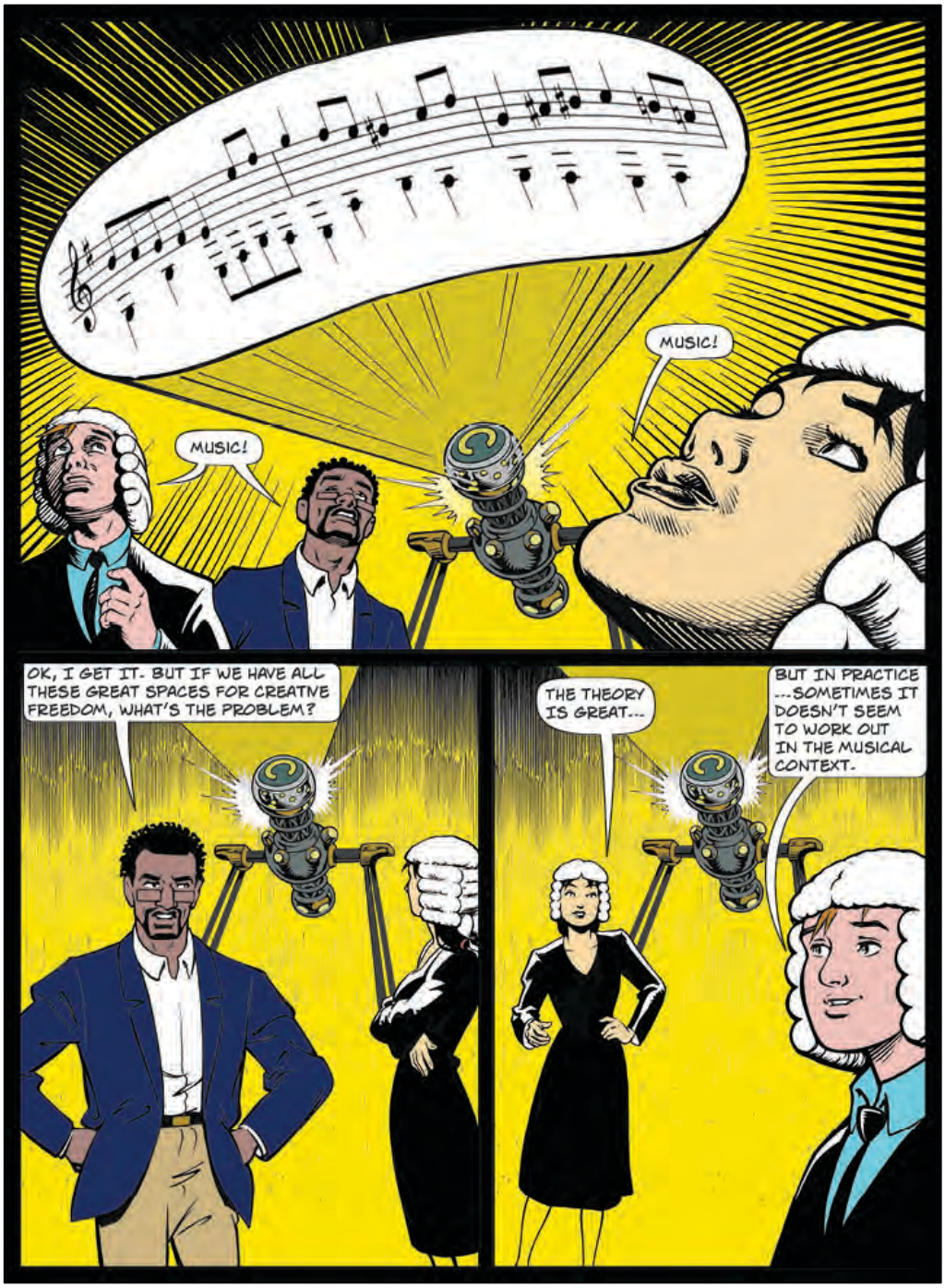
Textbooks and introductory academic books are expensive. I am passionate about music copyright and very much wanted this book about it to be available for free to anyone who was interested. But open access isn't just good for readers. It is good for authors. Every academic has an intuition about their audience—the people out there who would find their work useful or relevant. One thing we have learned at the Center is that those intuitions are frequently wrong. When we wrote a comic book about fair use and documentary film, we didn't expect it to be used as a guide to U.S. fair use law by people in entirely different fields. When my co-author and husband wrote a book about the question of whether AIs would ever achieve legal personhood, he thought he was writing to philosophers and jurisprudes. He didn't expect to be contacted by the CEO of a major AI company and asked about the ideas in the book. When we wrote an intellectual property casebook we didn't expect it to be used in other countries or by people who had no intention of studying to be a lawyer. Open access lets your audience find you, using the search engines and AI tools that are their general guides to the universe.

I had hoped to pay OUP for the right to make an open access version of the book available digitally, while still allowing them to sell print versions and even their proprietary digital content around it. Unfortunately, to them open access had become a niche idea, consigned to special programs aimed at libraries and the like, and they were unreceptive to the potentially more profitable arrangement of retaining the right to sell the book commercially alongside an open access version. I ended up paying less to make the book completely open access. That didn't make a lot of sense to me, but I am not an academic publisher. The happy result, though, is that this book comes to you entirely free of charge digitally, and in color, with all of the other freedoms that the license provides. I hope you enjoy it and find it useful.

GRAPHIC NOVEL EXCERPTS

The graphic novel portions of the book are not mere decoration; they are central to the points that it presents. Here is a sample excerpt that is featured in Chapter Five.


WE KNOW THAT COPYRIGHT ISN'T AN ABSOLUTE RIGHT- IT'S A MIXTURE OF RIGHTS AND LIMITATIONS...
IT'S THE BALANCE BETWEEN THEM THAT MAKES COPYRIGHT WORK-
WHIRL
CLICK
ZZZT
pFFT
BECAUSE COPYRIGHT'S GOAL IS TO ENCOURAGE CREATIVITY, AND FOR CREATIVITY THE LIMITATIONS ARE AS IMPORTANT AS THE RIGHTS!
SO WHAT MIGHT FIRST LOOK LIKE A...
COLANDER?...
NO! SO WHAT MIGHT FIRST LOOK LIKE A...
RAY GUN?...
WHAT LOOKS LIKE IT IS A RANDOM PATTERN OF PRESENCE AND ABSENCE, RIGHTS AND EXCEPTIONS...
OFF
ON
CLICK
---IS IN FACT DESIGNED TO ENABLE US TO MAKE...


MUSIC!
MUSIC!
OK, I GET IT. BUT IF WE HAVE ALL THESE GREAT SPACES FOR CREATIVE FREEDOM, WHAT'S THE PROBLEM?
THE THEORY IS GREAT...
BUT IN PRACTICE ...SOMETIMES IT DOESN'T SEEM TO WORK OUT IN THE MUSICAL CONTEXT.

READING GUIDE

Throughout the book, these icons are used to help highlight important points and to prompt you to listen to the music discussed in the text.

The pointing finger indicates a key point, generally one that will be built upon.

The scales of justice icon is used when an important legal rule is presented. This will allow you to focus on the basic legal principles on which today's law is based.

The gavel indicates an excerpt from a judicial opinion. By reading the words of actual legal decisions, you will come to a better understanding of the structure and culture of American law.

The loudspeaker icon prompts you to listen to the relevant music, which is available at https://web.law.duke.edu/musiccomic/audio/.

You can visit the book's website at https://web.law.duke.edu/cspd/musiccopyright/ to find additional resources, including a Spotify playlist and any updates.

STRUCTURE

The structure of the book follows the narrative arc described above.

The **Overture** focuses on why we care about music, encourages you to engage in a thought experiment to come up with the best incentive system to produce it, and presents some basic concepts: what is "intellectual property," and how is copyright infringement different from plagiarism?

Chapter One explores how music copyright came about. It examines the prerequisites for thinking of music as private property, and delves into the aesthetic, economic, and technological transformations that influenced the copyright system we have today. It also asks: What might different artists want from the system?

Chapter Two turns to the law itself, beginning with the vital question of "why" we have copyright. It then traces the development of music copyright since its inception, and how it has changed over time, along with perennial challenges. How does the law try to balance the opposing desires for control and freedom in musical creativity?

Chapter Three digs deeper into that interplay between new technologies and copyright law. It focuses on two key technologies—sound recording and radio—and the way they changed both the nature of music and the nature of law.

Chapter Four dives into the question of what it means to "own" music. Here we explore in detail the contours of music copyright. What is owned and what remains free? What do "originality," "idea," or "expression" mean in terms of copyright law? Why is music apparently so very hard for copyright law to handle?

Chapter Five introduces the question of copyright *infringement*. Here you will learn how the law draws the line between coincidental or commonplace similarities and illicit copying. How do judges and juries, often without musical training, distinguish between common elements in a genre—the strumming pattern in reggae, the "drop" in EDM—and portions of original expression illegally taken by one artist from another?

Chapter Six takes the story deeper; in this case, deeper into the mind. What does—and should—the law do with copying that is *subconscious*? In an online world where all of us could potentially be exposed to any song from anywhere in the world, how does an artist show they did not subconsciously copy from something they *might* have heard? In an online world where infringers could potentially appropriate from any tune produced anywhere in the world, how does an artist show that their song *was* copied?

Chapter Seven applies what you have learned so far to a famous case: the "Blurred Lines" lawsuit brought by the heirs of Marvin Gaye against Pharrell Williams and Robin Thicke. How do judges and juries, and musical experts hired by either side in a lawsuit, draw the line between benign influence and malign copying?

Chapter Eight presents some of the significant cases that followed the "Blurred Lines" decision. First, there were lawsuits against Led Zeppelin and Katy Perry in which courts sought to recalibrate rules that many felt were beginning to stifle musical creativity. That trend continued with a recent set of victories by Ed Sheeran and Dua Lipa, both of whom had been accused of copyright infringement for using commonplace musical elements. But the reality is more complex. That point is highlighted by the final cases discussed in the chapter, one against Miley Cyrus and the other against pretty much every famous reggaeton artist, claiming they have infringed copyright over a beat that is foundational to the genre.

Chapter Nine turns to sampling, focusing particularly on rap and hip hop. Borrowing or quotation is central to many American musical forms—jazz, for example. How did the law deal with the rise of *digital* sampling in hip hop? (Not well, is the answer.) More broadly speaking, how should the law adjust to new forms of musical creativity enabled by technology?

Chapter Ten continues the focus on sampling and delves into the inefficient and sometimes bizarre way that samples are cleared within the mainstream music industry. It will survey possible reforms as well as options for producing sample-based music outside of the conventional clearance system using new technological tools.

Chapter Eleven stays with the theme of technological change and chronicles the wild ride for the recording industry after illegal downloading upended its business model. It covers developments in copyright law as it responded to digital technology and the World Wide Web, as well as legal rules that have been resistant to change—such as the thicket of licenses, each a relic of some past technological transformation, that today's music services have to navigate.

Chapter Twelve continues the story in the previous chapter with a tale of *today's* technology. It begins by focusing on how the streaming era changed music: from its economics, to its curation, to how it sounds, and how those changes are likely to continue. The rest of the chapter focuses on generative AI, which promises to be the most revolutionary technology affecting music since the arrival of a global web, or even the invention of recorded music. AI promises to transform every aspect of music—from who or what creates it, to who curates it, to the economics of the music business and the shaping of our musical tastes. It may even revolutionize our understanding of music as an art form. The chapter does

not attempt to make firm predictions about *results*—where we will eventually end up—but it does offer one firm prediction about *process*: the way we will get there, the shape of the fights that will eventuate, and even the language that will be used by each side. One benefit of this book is that it will show you the master patterns repeated again and again in the history of music. To paraphrase an old saying: history doesn't repeat, but it does harmonize.

Chapter Thirteen turns to the question of copyright and racial justice. The history of America is a tale of injustice and perseverance, often along racial lines, and the history of American *music* is no different.

Finally, the **Coda** brings us full circle by drawing together themes and insights from the book.

For those who are using this as a textbook, there are Questions keyed to each chapter after the Coda. These questions are followed by Glossaries, Further Readings, and References.

That's the book. It is a fascinating story about a compelling art form, an intellectually challenging social puzzle, and an engaging technological and social history. I hope you enjoy it.

—Jennifer Jenkins

Overture

This is a book about music copyright, about *owning* music. In the chapters that follow, you will find out what copyright over music means. You will learn about copyrights over compositions (think of sheet music showing the musical notation and lyrics) and recordings (think of the track you stream or download to your phone). You will learn a little about the music *business*. If you wanted to start a new streaming service—another Spotify or Pandora—what licenses would you need from artists, and publishers and record labels? You will learn about *infringement*—what does it take to violate someone's copyright in a song? Surely, it has to be more than "I wrote a song about getting dumped by my lover and that other artist did too!" That's a pretty familiar theme. Surely someone can't own "funk" or "reggaeton" or "doom metal," though they can own a particular funk or reggaeton or doom metal song. But before we get to that, we have to start from some basics. The most basic question is "Why do we have the system of music ownership that we have?" After that, "How did we get here?" And then, "Did we make the right decisions?" and "Are we still making them?"

MUSIC

We need to pause for a moment to understand just how important music is to us. As a species, we have been making music for a *long* time. Archaeologists have discovered bone flutes that are over 40,000 years old. We were probably creating rhythm—clapping or banging things together—and singing well before then. Fossils from over 500,000 years ago show that ancient humans had the horseshoe-shaped "hyoid" bone, suggesting that their voice box was in a position that would allow them to sing. Other research suggests that we had the vocal anatomy for singing even earlier, over a million years ago.

Whenever we began making music, we did so in part because music brings people together. In *This Is Your Brain on Music*, Daniel Levitin writes: "Music is unusual among all human activities for both its *ubiquity* and its *antiquity*…Whenever humans come together for any reason, music is there: weddings, funerals, graduation from college, men marching off to war, stadium sporting events, a night on the town, prayer, a romantic dinner, mothers rocking their infants to sleep and college students studying with music as a background."

> "Music, uniquely among the arts, is both completely abstract and profoundly emotional. It has no power to represent anything particular or external, but it has a unique power to express inner states or feelings. Music can pierce the heart directly; it needs no mediation."
>
> –Oliver Sacks, Musicophilia: Tales of Music and the Brain

Music is a communal experience, but also an intensely personal one. We are touched and moved by all kinds of art, but music seems to reach us at a particularly deep level. Think of the moment when an artist seemed to be singing just for *you*, with a message that spoke directly to *your* life. Think of the sheer joy you felt as you and your friends spontaneously started to dance to a song that was playing. Think of the way that your developing musical tastes helped to define you as you grew up. Remember the delight of sharing a particular brilliant track or a new artist with a friend you knew would appreciate them. Remember the way that music can bear us up or console us at moments of tragedy. Think of "your songs"—not just your favorite playlist, but the music that outlines your taste, your sensibility. You.

That's how important music is to us. Where does all of this music come from? How does it get created, disseminated, and enjoyed? To answer these questions, let us engage in a thought experiment. Note: this is **not** reality.

Use Yourself as a Research Subject

Take a moment to think about the music in your life. Favorite songs in middle school or high school. Love songs, breakup tracks, makeup tracks. The sounds that make you want to dance, or party, or workout a little harder. The sounds that make you relax. The music that you discover, deep within layers of playlists. The music that finds *you*, at sporting events, in shopping malls, during the holidays.

By now, you may already have developed the musical preferences that will stay with you *for life*. One study suggested that musical tastes crystallize during the teenage years, with Spotify data indicating that the strongest preferences are formed at age 14 for boys, and 13 for girls. Other scholars have suggested the age is later—perhaps 18–20.

So…what were you listening to at those ages and *how did you get it*? Did you get it for free on YouTube or SoundCloud? Did you stream it on a service you subscribe to such as Spotify? Did you end up supporting the artists by going to concerts? Buying merchandise? How does the way that music gets paid for shape the sounds you hear?

MUSICLAND: A THOUGHT EXPERIMENT

Imagine you are a member of a newly formed society. Let's call it "Musicland." Everything is a blank slate. You want lots of things: jobs, great education and healthcare for everyone, and respect for the environment. But you also want art, and specifically music. Your new society has appointed you "music czar." They tell you, "We want great music. How do we get it? What do we need to do? Pass new laws? Provide a state budget? Give us a plan." You go away to strategize. You know musical tastes vary, so you want a diversity of styles. You want a vibrant music scene. And you want people to be able to make a living from composing and performing. What are your options?

The first is to do little or nothing and **let music develop as an amateur activity**. After all, people have always made music and always will. The word "amateur" comes from the Latin *amare*, "to love." People will create music because they love it. Maybe you put some effort into teaching music in schools, or introducing kids to different instruments, but after that you just sit back. No new laws are needed, no state budget. Some people just sing in the

shower. Others will spontaneously launch into song when they are walking in a park. Maybe some even sing in the local pub or café and get a free drink for their pain. But there is no music *business*. Saying "I am going to be a musician" or "I am going to be a composer" is like saying "I am going to be an entertaining dinner guest." It might make you popular, but it isn't a *job*. What would the music be like in this world? It would rely heavily on whatever songs you brought with you to your new society. There would be familiar lyrics and lullabies that you learned from your parents, and sometimes a new tune, penned by someone who had the urge. You might even get "Baby Shark." (You shudder at that thought.) There are no rules governing this amateur activity. If you like the new song that your friend made up you can imitate it, or change it, just as you could see her haircut or fashion choices, admire them, and get something like them for yourself. Your friend does not "own" her haircut or her pairing of those jeans with that jacket. And in this world, she does not own her music either.

Perhaps that does not seem enough to you. But then you realize that there are wealth inequalities in your new society. (Apparently you brought along some stuff from the old world after all.) Some people or companies have vast resources. Some musicians or composers have incredible gifts. It would be a shame if the young Mozart had to go to work as a stable-hand or a clerk. You realize that **there is another solution: patronage!** The rich and powerful people will become the patrons of the aspiring performers or composers. Emperor Joseph II appointed Mozart as his "chamber composer." Mozart composed music. It was played in the royal court and imitated elsewhere in the country. Emperor Joseph II gained prestige as a result and got to hear some good music as part of the bargain. Now there will be people who make a living from music, but they do it by writing for the pleasure of their patrons and the patrons' friends. The musicians or composers who can please the ear of the patron are the ones who get hired. **The incentives shape the music.** In addition, music is fee-for-service. If someone can get a copy of Mozart's latest composition, they are free to copy it, or modify it. Mozart might try to keep control over—might *own*—the *physical paper* of his music manuscripts, but he does not own the music on that paper. As you will see, this was true whether Mozart was writing compositions for the emperor or for anyone else. The only rule in this world is "imitation is the sincerest form of flattery."

Are there alternatives? You realize that **the state could choose to subsidize music**, to provide it as a public good, in the same way that it provides public parks or art galleries or that it funds basic scientific research or an ad-free public TV station. This means you need a budget—funded by tax revenues. You would have to decide what kind of music to make and play, of course, just as you have to decide where to put the park or what art to put in the gallery. Maybe there would be annual goals for what kind of music we wanted, set by experts: "More boy bands!" "Edgy, Political Protest Rap!" "Polka!" "Klezmer music you can dance to!" Or perhaps you'd invite the public to vote, to select new composers and new performers, who would then receive their stipend from the state. The people are paying taxes for the music, after all. Again, the selection process will shape the music. If the national music authorities, or the people who vote, like banjos, or string quartets, or dubstep, or trap, then we will get a

lot of that kind of music. The state has taken the role of patron. Once the music is paid for, it is free for everyone to do what they want with it.

We haven't said anything about the technology in your brave new world. But that clearly matters. "Technology" here is a broad category. It includes everything from musical notation—without which music is an oral tradition, with no fixed version—through the technologies of *reproduction* such as the printing press, the tape recorder, the CD factory, or the hard drive, to the technologies of *distribution* from the wagon that carries sheet music, to the van that carries vinyl records, to the radio station, the online video site, or the streaming service.

What if you have the technologies that we have available in 21st-century America? With all of these technologies, you realize you have still more options. Amateurism, in a world of viral videos and influencer-generated content, begins to look a lot more professional. In this world, someone might come up with "Old Town Road," or "Gangnam Style," or "Call Me Maybe," or "Baby Shark." They could become **internet-famous**. The platforms would be willing to pay them for the eyeballs their songs attract. In turn, they'd sell those eyeballs to advertisers. Their fame might also bring them gigs or endorsements. Now, in your brave new world, there is no copyright law yet, so it is perfectly legal to copy the song or for someone else to perform it or change it. But perhaps people still want the original? Or maybe they do not. Performers who are beautiful or who are great dancers would have a decisive advantage. There would be less of an advantage for the person who does not have a great voice and trips over their feet when they dance, but can craft great tunes.

The same technology could allow for another kind of patronage. Patreon, Kickstarter, and GoFundMe are platforms that allow artists to appeal directly to the public to fund their music. Maybe you really like an artist and think they could be *amazing* if they devoted themselves to music full time. You contribute to their campaign, maybe even get your name (in very small print) on their YouTube page or the cover of their vinyl record. The public has become Emperor Joseph II. We have democratized patronage and made it crowdsourced. Call it "**micro-patronage**."

Finally, you realize there is another option. **The state could create property rights over music**, making it illegal to copy, and maybe even illegal to perform or change the music, without the permission of the owner. Since this is a rule about who can create copies, you decide to call it "**copyright**." Great name! One of your colleagues has been appointed "literature czar." He says they are considering the same option for books. Now if I want to copy your song, I need your permission. You can demand payment. You might need to strike a deal with a distributor to get the song widely publicized, and the distributor might well end up owning your copyrights as a result. But now, by introducing private property rights to music, we have created a new kind of market. Under patronage, Mozart only had to please the emperor and his courtiers. In this copyright-enabled marketplace, the person who can write—or perform—the most popular songs will get the greatest reward. But then you realize how hard it would be to draft these copyright laws. What would they permit? What if I want to make a parody of a song? Do I need to get permission? What if the owner doesn't like my

parody and says "no"? What if a particular musical style has very standard features—the "drop" in EDM, the standard I-IV-V chord sequence in rock, the lyrics about pickup trucks and the good old days in country music? Can someone own *those*? How do you draw a line between the stuff that is owned, and the stuff future musicians need to make more music themselves?

Dispirited, you go back to your government and tell them the job is too hard and you'd like to take on global climate change instead.

How did Mozart earn money?

Wolfgang Amadeus Mozart, oil on canvas by Barbara Krafft, 1819 (Photo 0.1)

Wolfgang Amadeus Mozart (1756–1791) (Photo 0.1) was one of the most prolific composers from the Classical period. He was a child prodigy, writing compositions at five years old and touring Europe at seven. During his career, he was supported both by patronage and freelance activities. Each had its trade-offs.

Employment by the church or nobility: Mozart's first employer was Prince-Archbishop Colloredo. It was not an ideal gig. The salary was low, and Mozart did not have the freedom to compose what he wanted or to perform where he wanted. After he asked to resign, he was physically thrown out and given, as he described it, a "kick up the backside" by the Archbishop's aide. Mozart's second job was more "harmonious"—this was his position as a part-time chamber composer for Emperor Joseph II.

Freelance work: Mozart also supported himself through independent activities. He was entrepreneurial, organizing successful concert series on a subscription model. With enough advance subscriptions, he could book the venue, hire the orchestra, and put on the show. If not, he would have to cancel. He also gave piano lessons, though he lamented the time that they took away from composing. Not all of these lessons were about money—he charged different rates depending on the students' ability to pay, even giving free lessons and free lodging to the young Johann Nepomuk Hummel, who later became a well-known composer and pianist.

Of course, Mozart got paid for writing music, not only for the Archbishop and Emperor, but also for people who commissioned particular works. The income was different than it would be for today's Mozart, who—thanks to copyright—could make money from subsequent uses of the work such as downloads, streams, performances, and licensing for films and TV. Back then, the money came from the initial commission. As you read earlier, it was fee-for-service, and it was difficult for composers to extend control beyond the original manuscript. Publishers issued unauthorized editions. Hand copyists (the people who transcribed the finished version of the manuscript) would make extra copies and sell them without permission. In response, Mozart turned to self-help: having copyists work in his own apartment, and splitting the work between multiple people, so that none of them had the full composition.

For a brief period, Mozart's freelance activities brought him a great deal of financial success. Sadly, though, it did not last. He fell into poverty, before dying when he was only thirty-five.

THE REALITY: COPYRIGHT!

We do not live in the world of our thought experiment. But we have used, and in many cases *still* use, all the methods of generating and encouraging music that it describes. Music is created by amateurs and professionals, and supported by patronage, both state-funded and private. It drifts out of our collective folkways, finds ad-supported fame on internet platforms, receives revenue from live performance ticket sales and crowdfunding sites. But at the same time, music is also *copyrighted*—owned as private property.

***Copyright law* gives authors legal rights over their creations. It is a form of what lawyers call "intellectual property" because the rights are over *intellectual* creations such as novels, poems, movies, and music, rather than their *physical* embodiment.** If you have a book of sheet music, or a CD, the copyright is not over that tangible thing, but over the intangible music that exists independently of its physical manifestation. As you will learn, you can use copyright to stop others from reproducing, distributing, adapting, and publicly performing that music without your permission. Copyright is only one of the sets of laws that cover intellectual property; the others are *patent law*, which covers inventions, and *trademark law*, which covers brand names and logos. While inventions and logos also manifest in physical form, the "rights" are over the intangible innovation or brand.

At the outset, let's take a moment to distinguish between two things that are frequently conflated: *copyright infringement* and *plagiarism*. Rules against both forbid you from copying, and sometimes they overlap, but they are not the same. Nevertheless, people often use these concepts interchangeably and confusingly. As you will see in this book, even judges regularly use the word "plagiarism" as a shorthand for copyright infringement, but this terminology is actually misplaced. The following sidebar will demonstrate how they are different. Note that in sketching out copyright's contours, it refers to some legal rules that we will examine in more detail later in the book, such as "fair use."

Plagiarism versus Copyright Infringement

Plagiarism is the act of copying ideas, concepts, or improper amounts of text, image, or other material without correct attribution. Plagiarism is a matter of ethics, rather than law, though sometimes plagiarists are disciplined for violating institutional norms. For example, a student might be expelled from a university for copying a fragment of an article and inserting it in their paper without attribution, or taking the central idea from a book and passing it off as their own.

Copyright infringement is the act of violating a legal property right that someone else possesses in a creative work—whether it is a book or a song or a movie. In the United States copyright infringement has nothing to do with attribution—if I copy a Taylor Swift song without her permission and sell it, I am violating copyright whether or not I say that she is the original author.

People often confuse plagiarism and copyright infringement. While someone can be both a plagiarist and a copyright infringer at the same time, the two concepts are actually different. The examples that follow should help you understand those differences.

- Joe has to write a sonnet for his Poetry class. Joe procrastinates until the last minute and can't come up with anything so he decides he will submit Shakespeare's famous Sonnet 18—"Shall I compare thee to a summer's day?"—and put his own name on it as the author (proving that he is not just a cheat but also an incompetent one). Joe is a **plagiarist** but he has **not violated copyright**. Copyright law did not exist when Shakespeare wrote that poem and if it had, the copyright would have expired centuries ago.
- Sheree really likes Madonna's "Like a Virgin" and thinks that more people in her generation should listen to it. She makes a "Madonna Tribute set" on a USB stick which features the song, an explanation of the lyrics, and lots of pictures of Madonna that she finds on the internet. She then sells it to her classmates. Sheree is **not a plagiarist**; she carefully acknowledged Madonna as the author of the song. But she is a **copyright infringer.** She has copied a copyrighted work without permission and she probably has no legal defenses such as fair use—it might be different if she were parodying and harshly criticizing the work, for example. (We will cover fair use in Chapter Five.)
- Kaui reads *The Second Sex* by Simone de Beauvoir, a book that describes the multiple ways in which women are subordinated and the ways in which that subordination comes to seem "natural." She is inspired by the book's ideas. Though she does not use de Beauvoir's words at all, she incorporates every stage of her argument into a paper she is writing, without crediting de Beauvoir. Kaui is **not a copyright infringer**: copyright does not cover facts or ideas—you could take every idea or fact from this textbook and copyright law allows you to, so long as you do not copy "protected expression." But she **might be a plagiarist**. The "might" is because some ideas pass so thoroughly into the general public debate that it is neither necessary or possible to trace them back to a single source. I do not plagiarize Shakespeare's "To be or not to be?" monologue from Hamlet when I say that everyone must decide the fundamental question of human existence for themselves. Still, it sounds like Kaui may have crossed the line.
- Ray is a jazz musician. He has written a new tune about the comedy of love. In the middle of a performance of the song he has a saxophone solo and—referring back to an earlier song—he improvises around a few bars from *My Funny Valentine,* a copyrighted tune with similar themes. Ray is **neither a plagiarist nor a copyright infringer**. He did not ask permission and he did not explicitly credit the source in words. But his copying was almost certainly a **fair use**—he took only a little and he transformed it—and it is customary in jazz to quote portions of earlier works: Ray meant for the listeners to hear the "quote" and to smile at it.

So now you know! Copyright infringement and plagiarism are two different concepts and it is important not to confuse them. They are animated by different sets of ethical, economic, and cultural concerns that we will cover in more detail in this book.

SUMMARY

The starting point for this book was a love of music and an appreciation for how profoundly music affects us. As a society, we want to encourage its production, and to enable its creators to make a living. But what is the best way to accomplish this? We have explored some possibilities, including the predominant system that we have chosen today: copyright. We have also looked at the broader concept of "intellectual property," and the differences between copyright infringement and plagiarism.

Throughout this book, you will learn more about how copyright works and how it applies to music, revisiting the questions you considered as part of the Musicland thought experiment. (Where is the line between what is owned, and what remains free for future musicians to use? Can someone own a musical style? Prevent a parody?) But first, we need to explore the questions of "how did we get here?" and "why copyright?"

Chapter One will cover the developments that paved the way for ownership rights over music. Copyright is a relatively recent invention. For most of musical history, it did not exist, and a lot of things had to happen for owning music even to make *sense*. It will also cover the aesthetic, economic, and technological changes that shaped the law we have today. Chapter Two will then delve into the basics of today's system, laying out the law's rationale and framework as well as some of the challenges it faces in trying to achieve its objectives.

1

How Did We Get Here?

Inside This Chapter

1.1 ANITA, BARRY, AND CALANDRA.....1
1.2 THE "WHAT" AND THE "WHO".....3
1.3 THE LAYERS OF HISTORY 9

In the introduction, we engaged in a thought experiment about different possible ways to make music flourish in the hypothetical Musicland and looked briefly at the system that we have chosen in Reality: *copyright*. We also looked at the broader concept of "intellectual property" and the differences between copyright infringement and plagiarism.

This chapter will cover the historical circumstances that shaped the copyright law we have today. First you will be introduced to Anita, Barry, and Calandra, whose different perspectives on copyright and creativity will be featured throughout this book. Then we will investigate the prerequisites for thinking of music as private property—something that, throughout most of human history, would have seemed very strange. Finally we will explore the broader context for copyright's development and ask: "How did we get here?" To answer that question, we will examine the aesthetic, economic, and technological transformations that informed our current copyright system.

1.1 ANITA, BARRY, AND CALANDRA

This book tries to bring copyright alive by using imaginary characters—some in our comic book and some in the text. Each of those characters has a different take on copyright. As you will see, the comic book characters travel through time in order to explore copyright's history as well as its current rules. The characters you are about to meet live in the present.

Let us start with Anita. She is a seriously talented songwriter. Her roommates, Barry and Calandra, are also gifted musicians. We will follow Anita, Barry, and Calandra in this book as they navigate the rules that govern their craft.

Anita's songs are confessional, with poetic lyrics over a dense bed of sound that draws from the music she heard growing up—R&B, soul, funk, early hip hop. She constantly hears music in her head, and has done so for as long as she can remember. The first time she tried to sing, however, she discovered to her chagrin that she had a dismal voice. That hasn't changed. So she writes songs for people like Calandra, who, true to her name, sings like an angel. (Calandra means "skylark" or "singing bird.") For his part, Barry is neither a traditional songwriter nor performer. He is a remix artist. He has an encyclopedic knowledge

of music and an uncanny sense of what beats, riffs, motifs, and lyrics stack well together—from Mozart to Nina Simone to Drake to obscure long-forgotten tracks, and everything in between. While Anita composes on the piano and Calandra uses her voice, Barry's instrument is his laptop.

The three roommates have divergent opinions about copyright law. **Calandra** is all in. Since she won her first talent competition as a kid, her plan has been to make it in the music business, ideally as a singer, but if not, she wants to work at a label, or be a manager or agent. She has even thought of going to law school and becoming a copyright lawyer! Whatever she ends up doing, copyright—by protecting her own work, or that of her clients—will have made it possible. She dreams of getting discovered by a label, topping the Spotify charts, hearing her voice on the soundtrack of a big movie or TV show. At every step, copyright is there—helping her make a deal with the label, get paid for streams, and license her performance for soundtracks. Right now, instead of stressing out about a career in investment banking or consulting, she spends her spare time recording songs. Whenever she does so, she finds it liberating to know the rules are in place to allow her to benefit if it becomes a hit. Whether or not she makes it big, copyright is motivating her to make music. Incentives work.

Barry is in a different position. If you ask him, he does not need a *financial* incentive to mash up yacht rock with doom metal, or make sonic collages so intricate you can't identify all of the genres in play. He does it because it's *fun*. (Also, truth be told, because it has been very good for his dating life. His remixes are immensely popular on campus.) His rewards do not come from copyright. He does not make any revenue from his remixes, though they do sometimes lead to other paid gigs, such as DJ'ing parties. If anything, copyright just *gets in the way*. So far as he knows, his art is illegal. (He *may* be right, but we will learn that it is more complicated in Chapter Nine.) His work keeps getting blocked on YouTube, and he is worried that the university is going to shut down his personal site because he is a "repeat infringer." He does not get permission for the music he uses, because doing so would be somewhere between cost-prohibitive and impossible—he can't afford to clear hundreds of samples, and in many cases, especially with the more obscure tracks, he wouldn't even know who to ask for permission. He is unimpressed with a system that doles out its biggest rewards to Taylor Swift, or worse yet, to Big Machine Records, her former label with which she had an acrimonious relationship. His mantra is "free culture."

Anita's take on the law is different from that of Calandra or Barry. While Anita often agrees with Calandra on copyright, Calandra tends to focus on the business side of things, while Anita focuses on the *art*. For her, the prospect of financial reward is secondary to her passion for creating music, regardless of what she does for a living. And while Anita normally disagrees with Barry, she does share some of his misgivings about the way the music business works. In particular, she is not sure that she would want to sign away her rights to a music company.

1.2 THE "WHAT" AND THE "WHO"

For Anita, Barry, and Calandra, the concept of owning music seems natural and obvious. It is the starting point for their conversations, and it is difficult to imagine things otherwise. But this was not always the case. Before we could have *property rights* over music, we needed to establish "what" is owned and "who" created it. This may sound very basic, but the "what" and the "who" were not as straightforward as you might think.

Imagine you lived in a society where music is a "folk" activity. That does not mean that everyone is only singing folk songs, but that they are engaging in a "folk" or traditional way of making music. This used to be the norm. To quote Daniel Levitin again, "Throughout most of the world and for most of human history, music making was as natural an activity as breathing and walking, and everyone participated."

Let's say you are living in Iceland during the "saga" age—a little more than a thousand years ago. There is music, for sure. There are traditional songs that people sing. Some have good voices and some bad. There might even be instruments. Sigrún is particularly good on the pan pipe. Helga has a deft touch on the flute and the lyre. The songs are traditional ones that you learned from your parents, and they from theirs. The words and music are important to your culture. Of course, individuals still put their mark upon the art. You might revere a particular singer for his version of a traditional song—for the emphasis Ingibjörg gives to one storyline or the emotion that Ólafur puts into the tragic lament. But do they "own" those songs? What would that even mean? In a society where music is communally created and elaborated, where it is an oral tradition—never recorded on paper or by some mechanical device—to talk about "ownership" of music is literally meaningless. That does not devalue traditional folk culture and music. Quite the contrary! But it does show how *strange* our ideas about owning music would have been to most people throughout human history.

Who Wrote "Baby Shark"?

For a contemporary example of the folk tradition, we turn to "Baby Shark." (Seriously.) You've probably heard the song. Pinkfong's "Baby Shark" video has more than 16 *billion* views on YouTube, making it YouTube's most viewed video. The song became the Washington Nationals' anthem during their World Series run, with tens of thousands of fans singing it in the stands. During the October Revolution protests in Lebanon, demonstrators spontaneously serenaded a scared toddler with "Baby Shark" to calm him down. It is a cultural phenomenon. But who wrote it?

Photo 1.1

Take a listen to Pinkfong's version of "Baby Shark" on YouTube (if you can stand it). That's the famous one (Photo 1.1). Now listen to the earlier "Baby Shark" by children's entertainer Jonathan Wright, who is professionally known as "Johnny Only." They sound like the same song! Wright claimed that Pinkfong violated his copyright, but it turns out that neither he nor Pinkfong wrote the tune. It came from the oral tradition.

"Baby Shark" developed as a sing-along chant at summer camps—a "zipper song," like "Old MacDonald Had a Farm," that was easy to sing and embellish. Campers would start with its basic refrains—about "baby shark," "mommy shark," and other members of the shark family—then add their own verses. The shark encounters did not end well, and the song's lyrics tended to descend into death and dismemberment, perhaps inspired by the film "Jaws." The zipper song was not written down and copyrighted; rather, it spread from camp to camp, around the United States and around the world.

What both Wright and Pinkfong did was create sanitized, kid-friendly versions, without the gory stuff. The specifics were different—in Wright's version he goes swimming, sees a fin, and is saved by a lifeguard, while in Pinkfong's version fishes go hunting, run away, and are "safe at last." Both Pinkfong and Wright can own their particular adaptations. But they only own the new material they came up with themselves; no one owns the underlying song or the general idea of making a kid-friendly version of it.

The kind of creativity that was happening in Iceland during the saga age, or at summer camps chanting around the campfire, was collective and fluid. There was neither a static version of the song (the "what") nor an *author* who wrote it (the "who"). Both of these are prerequisites for copyright. How did they develop?

To explore the "**what**," we turn to our first comic book excerpt, featuring its three time-traveling characters.

SO, THAT GUY SAID YOU WERE THE EXPERT- WHEN WAS THE FIRST TIME SOMEONE LISTENED TO A SONG AND THOUGHT IT WAS SOMETHING THAT COULD BE OWNED---?
WELL, THAT DEPENDS ON WHAT YOU MEAN BY "IT" AND WHAT YOU MEAN BY "OWNED."
IS THIS ONE OF THOSE LEGAL ANSWERS? DEPENDS WHAT THE DEFINITION OF "IS" IS?
"I DID NOT SAMPLE SONGS WITH THIS WOMAN!"
ACTUALLY, NO...
MONTH DAY YEAR HOUR MIN
DESTINATION TIME
PRESENT TIME
LAST TIME DEPARTED

2015
1730
1002
-505
-151
486
79
0
335
WHEN WE THINK OF MUSIC, WE THINK OF IT AS "FROZEN-" IN CDs OR MP3 FILES...
---OR TAPES, VINYL, SHELLAC--- WAX CYLINDERS-
TOWER RECORDS
STORE
HAMBURG TWIST
THE BEATLES
HING
GO!
Ktel
70's Style
EDISON
HOME
PHONOGRAPH
EDISON
GOLD MOU
RECO
ECHO ALL
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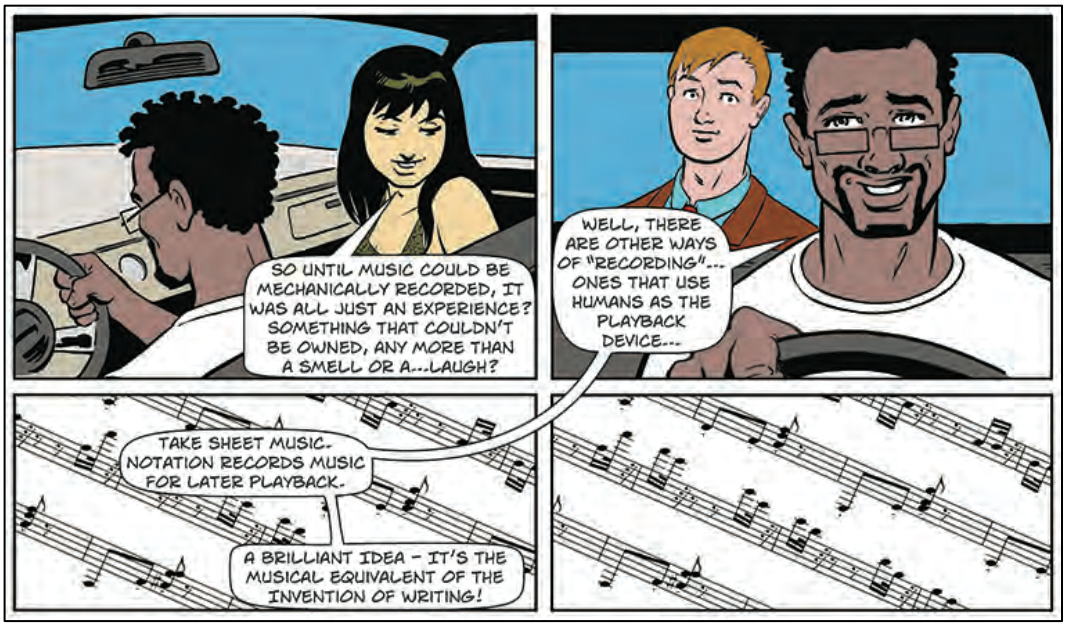

SO UNTIL MUSIC COULD BE MECHANICALLY RECORDED, IT WAS ALL JUST AN EXPERIENCE? SOMETHING THAT COULDN'T BE OWNED, ANY MORE THAN A SMELL OR A...LAUGH?
WELL, THERE ARE OTHER WAYS OF "RECORDING"... ONES THAT USE HUMANS AS THE PLAYBACK DEVICE...
TAKE SHEET MUSIC. NOTATION RECORDS MUSIC FOR LATER PLAYBACK.
A BRILLIANT IDEA - IT'S THE MUSICAL EQUIVALENT OF THE INVENTION OF WRITING!

As explained in the comic, for music to be owned, it had to be "frozen," or in copyright's terminology, "***fixed* in a tangible medium of expression**." Historically, in the Western tradition, that medium was the early "technology" of musical notation. After sound recordings were invented, music could be fixed on a series of new technologies that allowed automatic playback—wax cylinders, vinyl, tapes, CDs, mp3 files. Without these methods of fixation, music is just vibrations in the air, an "experience, something that couldn't be owned any more than a smell or a laugh." It is part of an oral tradition. It is Anita humming in the car, before she writes the melody down. *Fixation* makes it concrete.

Musical notation

The earliest musical notation dates from Babylonia (now Iraq) around 1400 BC. The Ancient Greeks also had a form of notation, though it seems to have been used infrequently —as a historical record of songs, not something musicians used every day. In practice, most of their music appears to have been generated by improvisation around common themes.

The precursor to our current musical notation was developed by the Holy Roman Empire in the Middle Ages. They wanted every church in the empire to sing the same standard set of holy music that was monophonic—using a single melody line, not complex harmonies, and vocal—plainchant, no instruments. At first, they sent around the Church's reference choir, the

Clockwise from top left: A drawing of the Hymn to Nikkal on the cuneiform tablet circa 1400BCE; the second of two Delphic Hymns to Apollo from the stone at Delphi circa 128BCE; the Guidonian Hand mnemonic for teaching singers to sight-sing from the 12th Century; Ottaviano Petrucci's printed score of Harmonicae Musices Odhecaton from 1501, and Mozart's piano sonata in F major using modern staff notation.

Schola Cantorum ("School of Singers") to show congregations how things should sound. But that was inefficient. So they turned to notation, which had largely died out, and circulated that instead. Ironically, even though this new "technology" was intended to impose uniformity, and the church's preference for music that was monophonic and plainchant, it ended up allowing experimentation. Composers could now build on what was written down, creating polyphonic music with intertwining harmonies that used multiple instruments. Notation, as a "technology" of control, ended up having the opposite effect.

During the Renaissance, Johannes Gutenberg invented another transformative technology: the printing press. After a few decades, music publishers figured out how to use this technology to print musical notation. Now musical scores could be mass produced and widely disseminated. Because printing scores was intricate and expensive, some of these publishers got exclusive rights over the innovative methods they had developed to print music. These were not ownership rights over a particular musical composition; instead, they covered the techniques used to print the music, not the music itself. The publisher of the piece you see at the lower right above was Ottaviano Petrucci, who received a 20-year monopoly over all musical printing in Venice in exchange for his ingenious printing technology.

The images in this sidebar show some examples of musical notation through history. Note that different cultures around the world use different kinds of notation; most of these are from the Western tradition because that is where our notation and copyright system developed.

That brings us to the "**who**." What does it mean to think of Anita as the "**author**" of her music? As you will learn, copyright centers around a particular conception of authorship.[2] The right to *own* creations is based on the notion that they are *original* to the author—that they are the product of the author's individual genius, rather than being *derivative*, or copied from somewhere else. If Anita pens a melody, she can copyright it because she came up with

> If I have seen further, it is by standing on the shoulders of giants.
>
> –Isaac Newton

[2] Even though authorship is an important principle animating copyright law, in practice copyrights are frequently not owned by the people who actually created the work. Companies can be "authors" of works made by their employees as "works made for hire," and musicians regularly transfer their copyrights to publishers and record labels who help distribute and finance their work. This will be discussed in later chapters.

it herself; she can't lay a claim to a tune she copied from Calandra. When we were talking about the communal authorship in folk traditions, it was difficult to trace authorship to an identifiable person, or to a discrete group of identifiable co-authors. Even with someone like Anita, however, the idea that the music she generates is "original" to her is relatively recent. Some older cultures thought that music was divinely inspired, a "gift from the Gods." If so, no mere mortal could have been the source of a beautiful melody or pleasing harmony. In Western Europe, it was only during the Renaissance that composers began to think of themselves as "artists" *creating* music rather than "artisans" *crafting* it. The notion of "originality" that copyright has today resonates better with Romantism, the aesthetic movement that peaked during the 19th century.

But is anything *truly* original? Or are we all, to some extent, "standing on the shoulders of giants"? Perhaps creativity is a mixture of both—putting our original imprint on what came before? These questions have preoccupied thinkers for some time and may have been debated in your other undergraduate courses. For copyright law, they illuminate the tension between the *theory* of authorship and the *reality* that we do not create in a vacuum. We inevitably build on the past, whether it's by using basic building blocks from other songs, or by engaging with our musical inspirations—riffing on a familiar tune, fusing different genres, sampling from an old recording. Music builds on itself. Copyright law is constantly navigating the friction between its vision of original authorship and the fact that creativity is derivative, and the next chapter will explore both the history of borrowing in music and how the law tries to strike a balance between granting authors control over what they create and leaving them enough freedom to create in the first place.

While the historical idea of authorship at the heart of copyright law tells us "who" can own music, it is far from neutral. For example, its focus on an "original" individual author, who was assumed to be creating on a blank slate, was part of a larger set of biases that had the effect of downplaying communal and performance-based traditions or those based on live improvisation. How do you identify the sole, original, creative author in a folk tradition? Many have argued that this focus had the particular effect of giving too little credit, and too few property rights, to music created by a range of Black musical traditions. We will discuss this in detail in Chapter Thirteen, which will discuss the ways in which Black musicians were routinely deprived of credit and compensation for their contributions to American music.

There were also other long-running patterns of exclusion that kept talented creators out of copyright's domain. Not everyone had the practical or financial wherewithal to be an "author," or could break through the prejudice implicit in stereotypes about what an author should look like. The fact that most of the well-known composers from the classical era are male is not because of some inherent biological musical superiority but because social norms impeded many women from becoming professional composers. Women were expected to concentrate on the domestic sphere. There were many women who overcame those barriers to compose, but even then their works have generally been overlooked and underrecognized. The pianist and composer Clara Wieck Schumann (1819–96) famously wrote in her diary: "I once believed that I possessed creative talent, but I have given up this idea; a woman must

not desire to compose—there has never yet been one able to do it. Should I expect to be the one?" Is this really what she thought, or what she was told she must think? Regardless, it is dispiriting to read.

This kind of suppression was by no means confined to Schumann. Fanny Mendelssohn Hensel (1805–47), the older sister of the composer Felix Mendelssohn, was a virtuoso pianist and composer. Her father dissuaded her from being a professional musician, writing to her: "Music will perhaps become his [Felix's] profession, while *for you it can and must be only an ornament*." Such attitudes affected her confidence, if not her output—she ultimately wrote between 450 and 500 works, though a number of her earlier works were published under Felix's name rather than her own.

The same pattern can be found in the United States, sometimes compounded with racial biases as well as gendered ones. Florence Beatrice Price (1887–1953) was the first Black woman to have a work performed by a major American orchestra—the Chicago Symphony Orchestra. Despite this milestone, she struggled as a composer, and was keenly aware of the obstacles she faced. In a 1943 letter to the conductor Serge Koussevitzky, she wrote: "To begin with I have two handicaps—those of sex and race." She knew that "the work of a woman composer is preconceived by many to be light, froth, lacking in depth, logic and virility." As you read the accounts of famous composers, and think about the canon, never forget its absences—all the work we do not have because of exclusions such as these.[3]

1.3 THE LAYERS OF HISTORY

The fixation of music in tangible form and the concept of original authorship are part of a larger story. People often talk as though copyright was entirely a legal affair. But, as we have just seen, the evolution of copyright—and music copyright in particular—is about more than just the law. There are a vast set of **preconditions—technological, cultural, economic, and, yes, legal**—for the idea of "owning" music even to make sense. You probably have some friends who are really good at making conversation. People who are witty. They are able to draw the shy person out of their shell and to keep the discussion going, steering the chat without dominating or controlling it. You don't generally think of these people as "professional conversationalists" or wonder whether they have exclusive rights to their favorite topics of conversation. In our society, "conversation" is a folk activity. True, there are exceptions—the great talk show host or psychotherapist—but most of the time, we don't think this needs to be the subject of property rights.

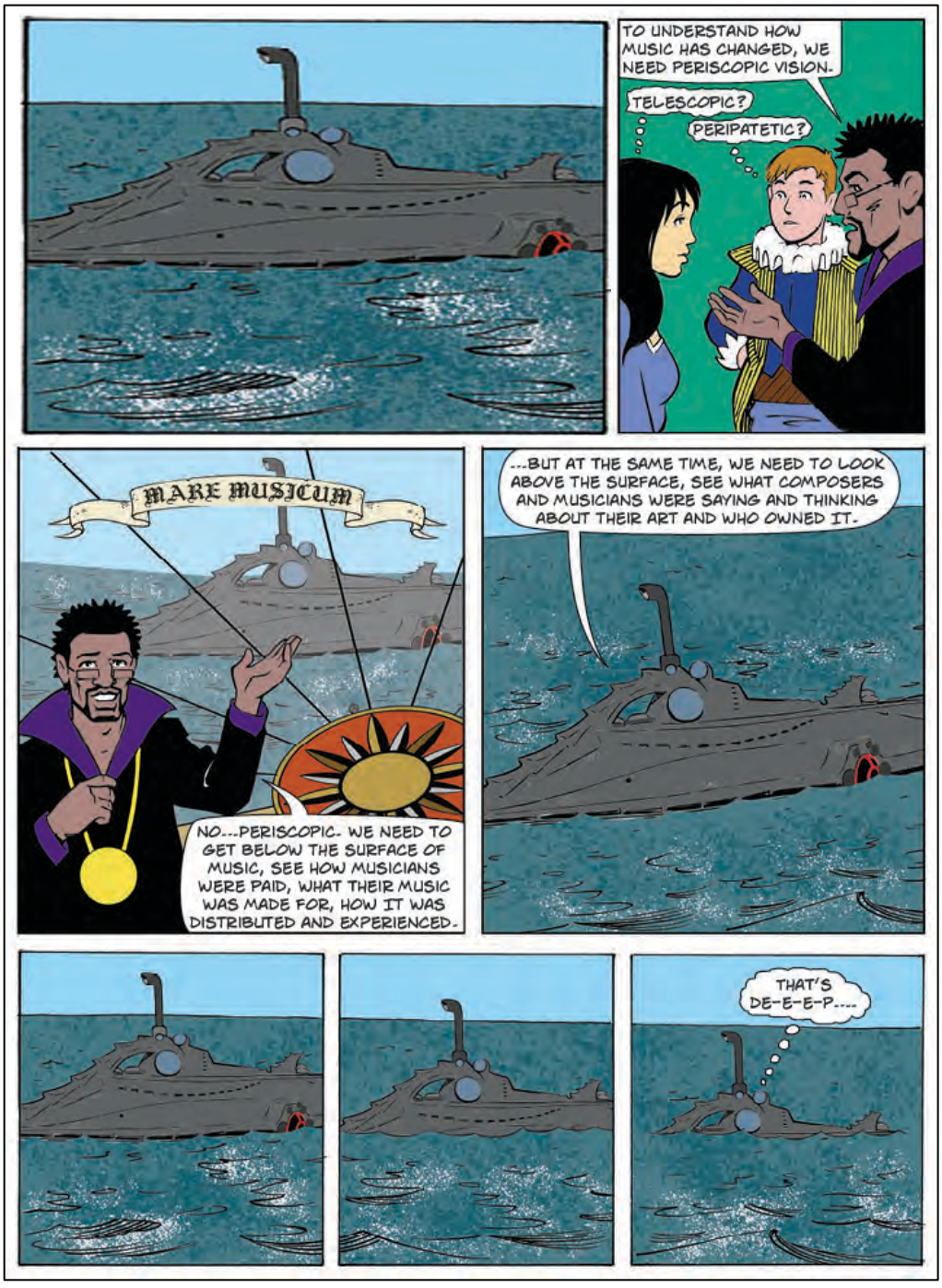
For us to think of music as fundamentally different from conversation, a huge range of transformations had to occur. We have just discussed a few of them. Some of them were

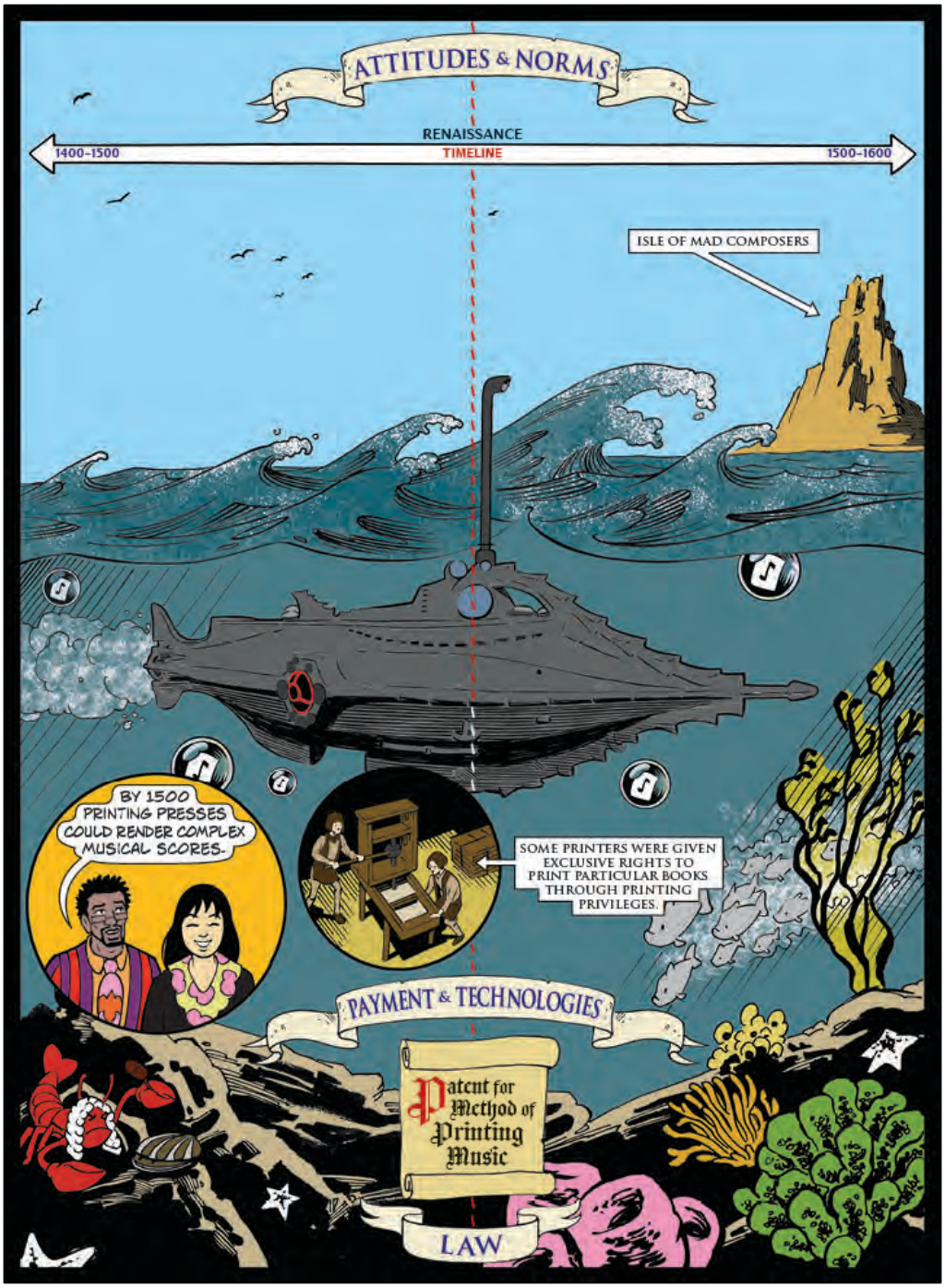
[3] Happily, the work of women composers is now enjoying long overdue attention. You can read the fascinating biographies of such composers in Mary F. McVicker, *Women Composers of Classical Music: 369 Biographies from 1550 into the 20th Century* (2011) and Diane Peacock Jezic, *Women Composers: The Lost Tradition Found* (1994). For feminist analyses of copyright law, *see* Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) and Deborah Halbert, "Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures," in *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (Lise Buranen & Alice M. Roy, eds.) (1999).

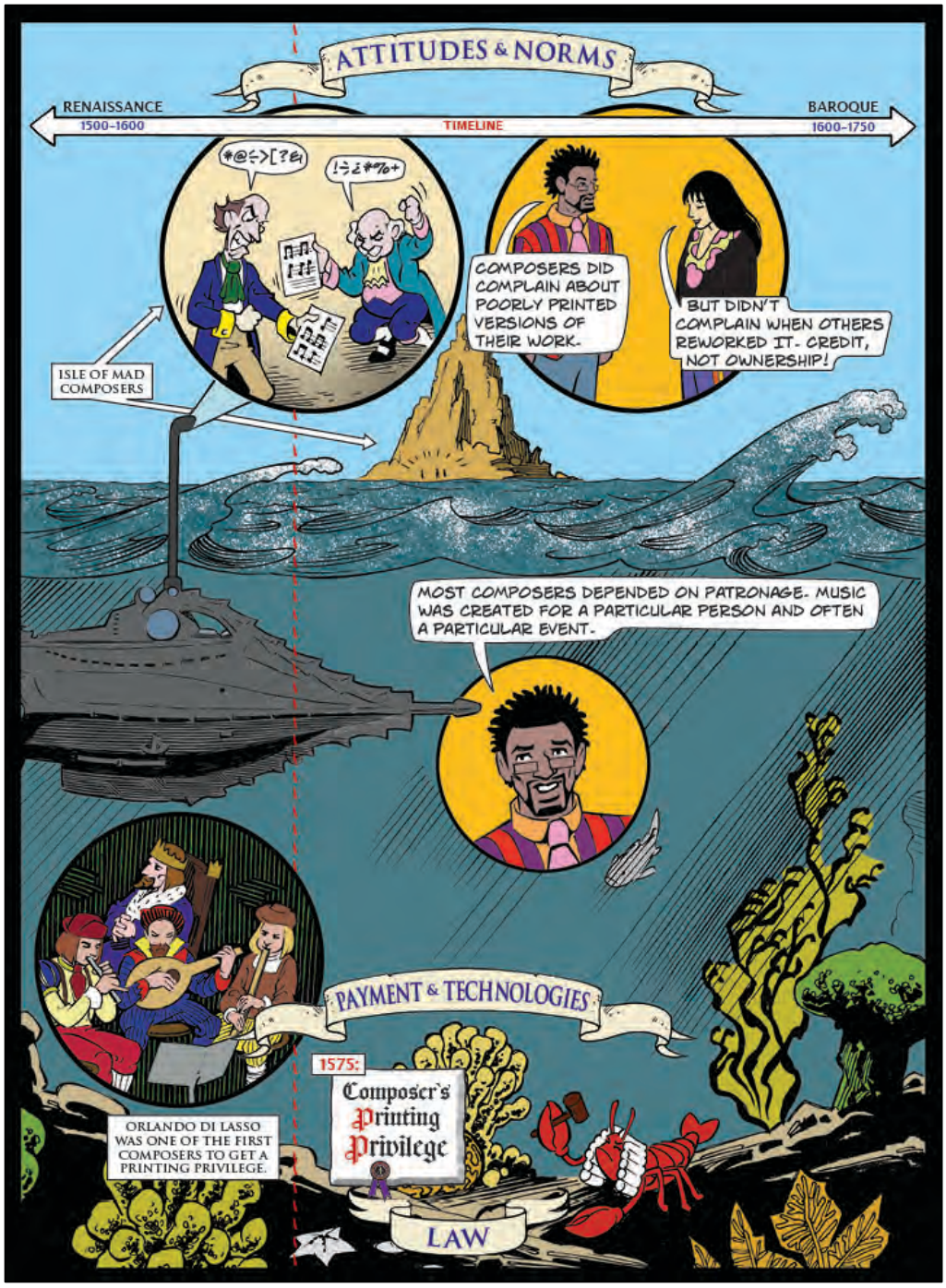
technological, with "technology" including everything from musical notation to audio recording. As explained earlier, it is hard to think about owning a song—about a song as "property"—if there is no fixed version of that song. Notation and recording technologies provided that "fixation." Some of them were *cultural*: music went from being something that everyone made for themselves to something that was made by professionals for mass consumption. These professionals began to think of themselves as "authors" in the Romantic sense. Some of them were *economic*: an expanded middle class had both leisure time and the ability to buy musical scores they could play at home. The same transformation would later give them the ability to purchase new devices—player pianos! gramophones! radios!—on which they could experience music made elsewhere.

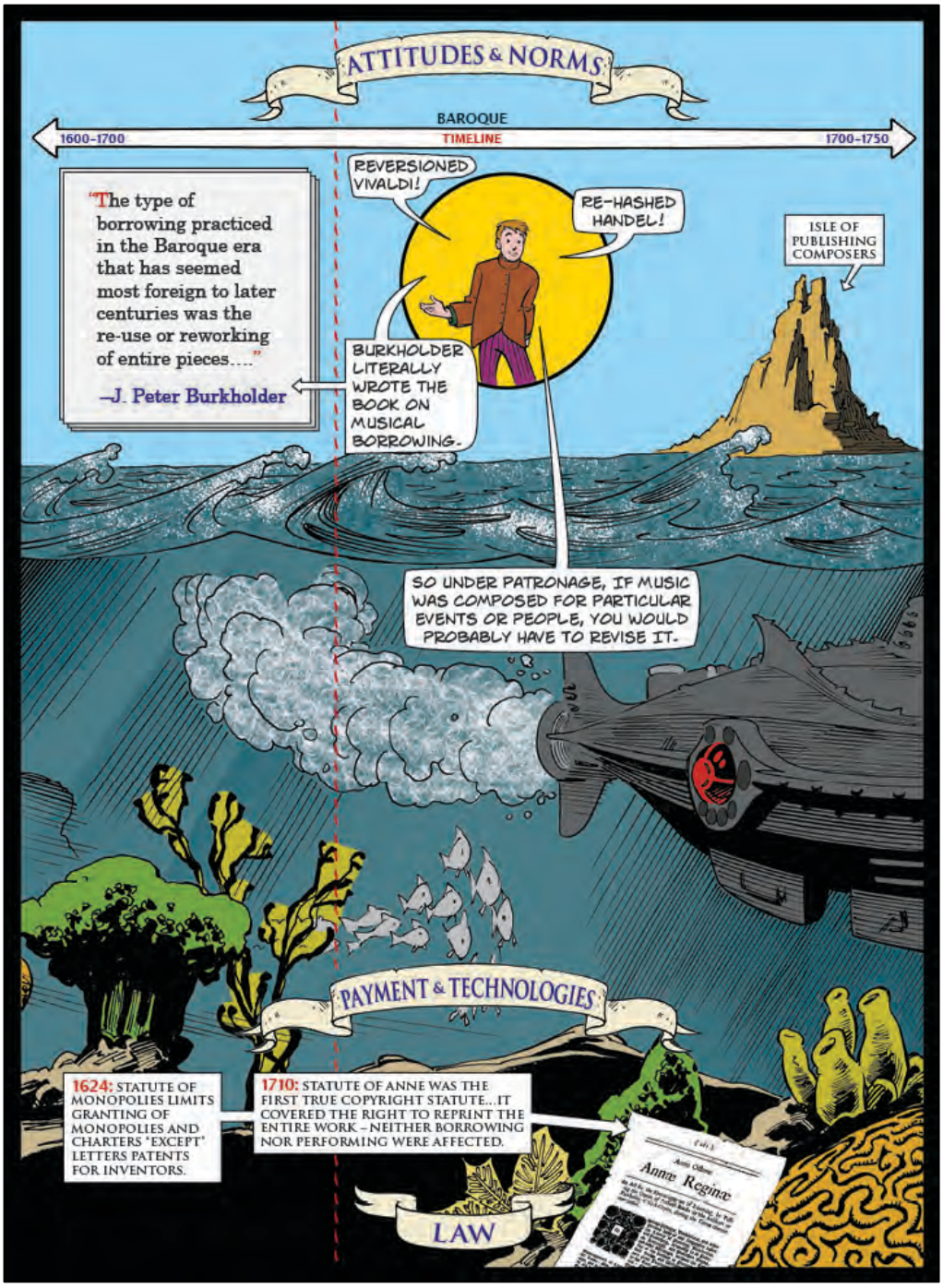
Why stress these transformations? Because to understand music copyright law you need to understand how we got to the rules, the economy, and the business culture that we have now. **The road has been neither straight nor predictable.** In Musicland, you were starting with a blank slate, a *tabula rasa*. In reality, our system was **shaped by its context**.

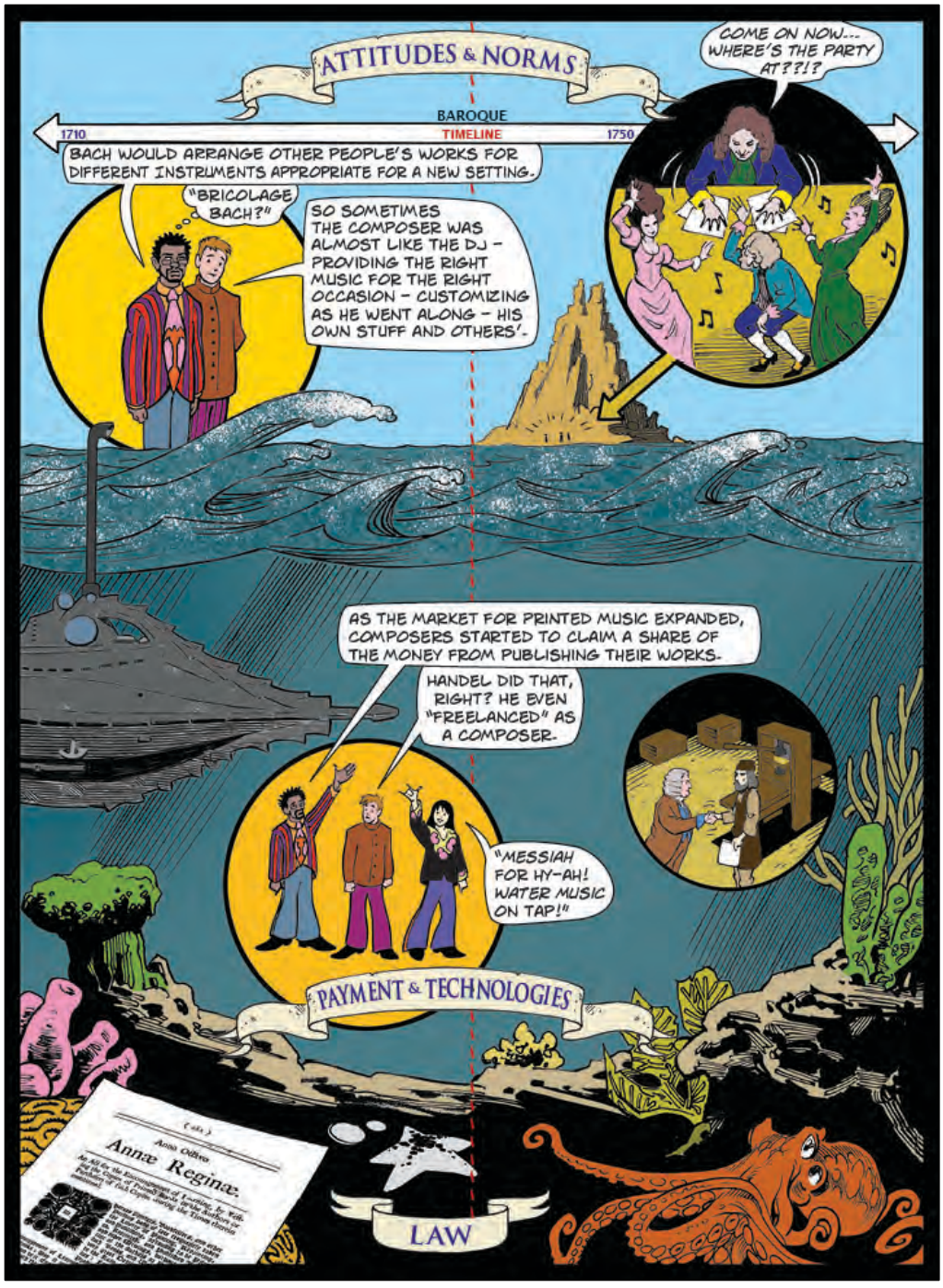
What follows is a comic book timeline showing these layers of transformation. Our characters descend below the *surface* of music to see the underlying forces driving its production. The top row shows "Attitudes and Norms" toward control and ownership, including shifting attitudes toward borrowing and the development of the author. These attitudes are part of changing musical aesthetics. The middle row shows how "Payments" transitioned from patronage to a market-oriented system, and depicts successive "Technologies" such as the printing press, lithography, and mass-produced pianos. Down with the bottom-dwellers, you see the gradual evolution of the "Law," going from printing privileges that went to the publishers (rather than composers) to reward them for their innovation in printing music, to early copyright, which gave rights to composers but left borrowing largely untouched. Notice how everything interconnects. To take just one example, as you will see, the industrial revolution made it cheaper to mass produce pianos (technology), which meant that more people could afford to have them in their homes, which created a market (payment), which prompted composers to write music that could be played on those pianos (aesthetics). Note that the book necessarily focuses on Western music because it is in the context of that music that musical copyright developed. But there are rich histories of global music that are well worth your time—some of these are included in the Further Reading list.


TO UNDERSTAND HOW MUSIC HAS CHANGED, WE NEED PERISCOPIC VISION.
TELESCOPIC?
PERIPATETIC?
MARE MUSICUM
NO...PERISCOPIC. WE NEED TO GET BELOW THE SURFACE OF MUSIC, SEE HOW MUSICIANS WERE PAID, WHAT THEIR MUSIC WAS MADE FOR, HOW IT WAS DISTRIBUTED AND EXPERIENCED.
...BUT AT THE SAME TIME, WE NEED TO LOOK ABOVE THE SURFACE, SEE WHAT COMPOSERS AND MUSICIANS WERE SAYING AND THINKING ABOUT THEIR ART AND WHO OWNED IT.
THAT'S DE-E-E-P....

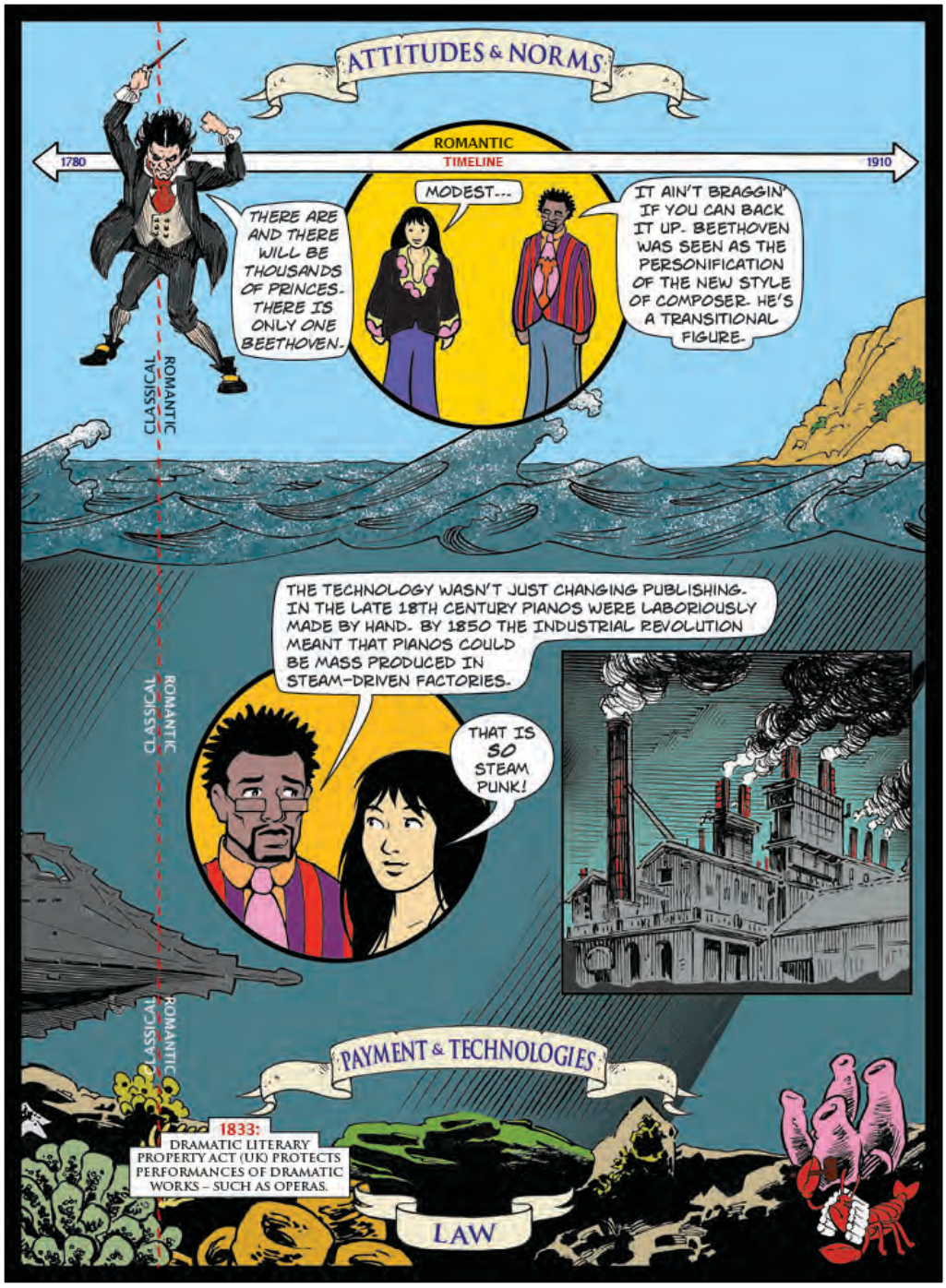

ATTITUDES & NORMS
RENAISSANCE
1400–1500
TIMELINE
1500–1600
ISLE OF MAD COMPOSERS
BY 1500 PRINTING PRESSES COULD RENDER COMPLEX MUSICAL SCORES.
SOME PRINTERS WERE GIVEN EXCLUSIVE RIGHTS TO PRINT PARTICULAR BOOKS THROUGH PRINTING PRIVILEGES.
PAYMENT & TECHNOLOGIES
Patent for Method of Printing Music
LAW


ATTITUDES & NORMS
RENAISSANCE
1500–1600
TIMELINE
BAROQUE
1600–1750
*@÷>[?€
!÷¿*%+
ISLE OF MAD COMPOSERS
COMPOSERS DID COMPLAIN ABOUT POORLY PRINTED VERSIONS OF THEIR WORK.
BUT DIDN'T COMPLAIN WHEN OTHERS REWORKED IT- CREDIT, NOT OWNERSHIP!
MOST COMPOSERS DEPENDED ON PATRONAGE. MUSIC WAS CREATED FOR A PARTICULAR PERSON AND OFTEN A PARTICULAR EVENT.
PAYMENT & TECHNOLOGIES
1575:
Composer's Printing Privilege
ORLANDO DI LASSO WAS ONE OF THE FIRST COMPOSERS TO GET A PRINTING PRIVILEGE.
LAW


ATTITUDES & NORMS
BAROQUE
1600–1700
TIMELINE
1700–1750
"The type of borrowing practiced in the Baroque era that has seemed most foreign to later centuries was the re-use or reworking of entire pieces…."
–J. Peter Burkholder
REVERSIONED VIVALDI!
RE-HASHED HANDEL!
ISLE OF PUBLISHING COMPOSERS
BURKHOLDER LITERALLY WROTE THE BOOK ON MUSICAL BORROWING.
SO UNDER PATRONAGE, IF MUSIC WAS COMPOSED FOR PARTICULAR EVENTS OR PEOPLE, YOU WOULD PROBABLY HAVE TO REVISE IT.
PAYMENT & TECHNOLOGIES
1624: STATUTE OF MONOPOLIES LIMITS GRANTING OF MONOPOLIES AND CHARTERS 'EXCEPT' LETTERS PATENTS FOR INVENTORS.
1710: STATUTE OF ANNE WAS THE FIRST TRUE COPYRIGHT STATUTE…IT COVERED THE RIGHT TO REPRINT THE ENTIRE WORK – NEITHER BORROWING NOR PERFORMING WERE AFFECTED.
Anne Regina
LAW


ATTITUDES & NORMS
BAROQUE
1710
TIMELINE
1750
BACH WOULD ARRANGE OTHER PEOPLE'S WORKS FOR DIFFERENT INSTRUMENTS APPROPRIATE FOR A NEW SETTING.
"BRICOLAGE BACH?"
SO SOMETIMES THE COMPOSER WAS ALMOST LIKE THE DJ – PROVIDING THE RIGHT MUSIC FOR THE RIGHT OCCASION – CUSTOMIZING AS HE WENT ALONG – HIS OWN STUFF AND OTHERS'.
COME ON NOW... WHERE'S THE PARTY AT?!?
AS THE MARKET FOR PRINTED MUSIC EXPANDED, COMPOSERS STARTED TO CLAIM A SHARE OF THE MONEY FROM PUBLISHING THEIR WORKS.
HANDEL DID THAT, RIGHT? HE EVEN "FREELANCED" AS A COMPOSER.
"MESSIAH FOR HY-AH! WATER MUSIC ON TAP!"
PAYMENT & TECHNOLOGIES
Anna Oliver
Annæ Reginæ
LAW

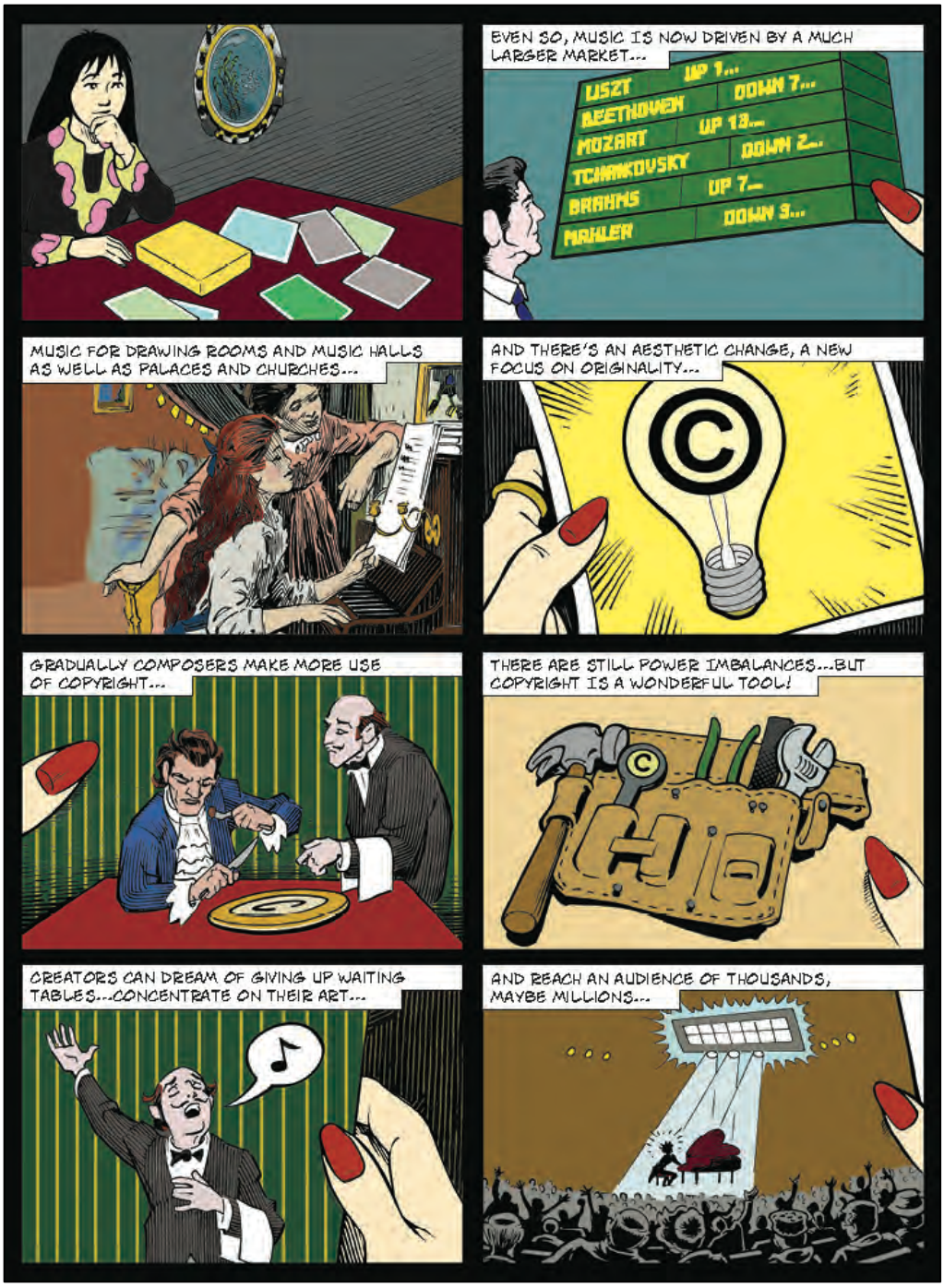
ATTITUDES & NORMS
SO HOW DID THAT CHANGE IN CLASSICAL MUSIC?
1750
CLASSICAL TIMELINE
1820
BY THE MIDDLE OF THE 18TH CENTURY, THE IDEAS BEGAN TO CHANGE IN LITERATURE AND THEN IN MUSIC. ART CAME TO BE DEFINED IN TERMS OF ORIGINAL GENIUS –
MY PRINCIPAL SOURCE OF INSPIRATION IS ME!!
AND THAT IDEA OF THE ORIGINAL AUTHOR ENDS UP BEING THE ORGANIZING PRINCIPLE OF COPYRIGHT! IT ALL CONNECTS.
COMPOSERS DISTINGUISHED THEMSELVES THROUGH NOVELTY, NOT BRILLIANTLY REWORKING TRADITIONAL MATERIALS.
THE INVENTION OF LITHOGRAPHY IN 1796 MEANT PRINTING MUSIC, WITH ATTRACTIVE PICTURES, WAS SUDDENLY CHEAPER AND EASIER.
LA LUTTE ARTISTIQUE
PAR E. MARIE
SO IS THIS WHEN COMPOSERS SHIFT TO SELLING THEIR MUSIC TO THE PUBLIC, NOT TO SOME PATRON?
PARTLY. BUT PATRONAGE DOESN'T DISAPPEAR. EVEN THOUGH HE FREELANCED, LISZT WAS STILL RELYING ON A DUKE'S PATRONAGE IN THE 1880s.
AT ONE POINT, HE AND HANS CHRISTIAN ANDERSON WERE BOTH BEING SUPPORTED BY THE DUKE OF WEIMAR. NOW THAT'S WHAT I CALL TALENT SPOTTING.
PAYMENT & TECHNOLOGIES
1793: FIRST FRENCH COPYRIGHT LAW COVERING ALL THE "BEAUX ARTS"
1777: BACH v. LONGMAN (UK) MUSIC IS COVERED BY COPYRIGHT. DOESN'T AFFECT BORROWING OR PERFORMING – JUST REPRINTING.
LAW


ATTITUDES & NORMS
ROMANTIC
1780
TIMELINE
1910
THERE ARE AND THERE WILL BE THOUSANDS OF PRINCES- THERE IS ONLY ONE BEETHOVEN-
MODEST...
IT AIN'T BRAGGIN' IF YOU CAN BACK IT UP- BEETHOVEN WAS SEEN AS THE PERSONIFICATION OF THE NEW STYLE OF COMPOSER- HE'S A TRANSITIONAL FIGURE-
CLASSICAL
ROMANTIC
THE TECHNOLOGY WASN'T JUST CHANGING PUBLISHING- IN THE LATE 18TH CENTURY PIANOS WERE LABORIOUSLY MADE BY HAND- BY 1850 THE INDUSTRIAL REVOLUTION MEANT THAT PIANOS COULD BE MASS PRODUCED IN STEAM-DRIVEN FACTORIES-
THAT IS SO STEAM PUNK!
PAYMENT & TECHNOLOGIES
1833:
DRAMATIC LITERARY PROPERTY ACT (UK) PROTECTS PERFORMANCES OF DRAMATIC WORKS – SUCH AS OPERAS.
LAW

ATTITUDES & NORMS
ROMANTIC
1810
TIMELINE
1910
SO THIS IS WHERE WE START SEEING COMPLAINTS THAT IMITATION IS PLAGIARISM, NOT JUST SINCERE FLATTERY?
EXACTLY. BUT BORROWING DIDN'T STOP, IT JUST CHANGED SHAPE. YOU COULD COPY FOLK SONGS TO SET A SCENE...
CHOPIN, TCHAIKOVSKY, DVORAK...
...OR YOU COULD TIP THE HAT TO AN EARLIER COMPOSER, OR EVEN MAKE FUN...
...AND A BIG SHOUTOUT GOES OUT TO MY MAN, MOZART.
I'D LIKE TWENTY ASSORTED SLAVIC FOLK SONGS AND A BUSHEL OF NAIVE MELODIES, PLEASE.
ALL THOSE PIANOS IN MIDDLE CLASS DRAWING ROOMS NEEDED MUSIC...
AND THE ROMANTIC COMPOSERS WERE READY TO PROVIDE IT.
ORIGINALITY WASN'T JUST AN AESTHETIC, IT WAS A WAY TO DISTINGUISH YOURSELF FROM YOUR COMPETITORS...
PAYMENT & TECHNOLOGIES
1851: SACEM COLLECTING SOCIETY ESTABLISHED IN FRANCE TO COLLECT COMPOSERS' AND PUBLISHERS' PERFORMANCE ROYALTIES FROM PUBLIC VENUES.
ACTE DE SOCIÉTÉ
LAW
1886: BERNE CONVENTION – THE FIRST MAJOR INTERNATIONAL COPYRIGHT AGREEMENT.

YOU KNOW, THIS IS FASCINATING, I MUST ADMIT.
CHANGING NOTIONS OF COMPOSITION, OF GENIUS, NEW TECHNOLOGIES, NEW WAYS OF GETTING PAID, THE BEGINNINGS OF OUR IDEAS OF ORIGINALITY, THE DEVELOPMENT OF COPYRIGHT...
YOU WERE RIGHT. AT FIRST I THOUGHT THAT LOOKING AT THESE THINGS WOULD DISTRACT FROM THE BEAUTY OF MUSIC.
IT DOESN'T. ANY MORE THAN UNDERSTANDING ANATOMY DISTRACTS FROM THE BEAUTY OF THE STATUE...
AND WE DO NEED TO UNDERSTAND IT ALL TOGETHER. MUSICAL NORMS, TECHNOLOGY, LAW, AESTHETICS...EACH INFLUENCES THE OTHERS. WE CAN'T UNDERSTAND CREATIVITY OR BORROWING WITHOUT SEEING THEM ALL...
AUDIENCES MATTER... TECHNOLOGIES MATTER... LAW IS STARTING TO MATTER...

PATRONAGE PRODUCED ONE KIND OF MUSIC...
AIMED AT THE EARS, AND PRIDE, OF ARISTOCRATIC LISTENERS.
TECHNOLOGY ALLOWED MUSIC TO REACH REMOTE EARS...
PRINTERS WERE THE FIRST TECHNOLOGICAL INTERMEDIARIES...
SOME RECEIVED LEGAL RIGHTS TO PRINT MUSIC...OR THE RIGHTS TO PARTICULAR SONGS...
WITH THE DEVELOPMENT OF COPYRIGHT, THE RIGHT SHIFTS TO THE AUTHOR...
STATUTE OF ANNE 1710
Anne Regina
COMPOSERS DON'T USE THE SYSTEM MUCH AT FIRST...
©


EVEN SO, MUSIC IS NOW DRIVEN BY A MUCH LARGER MARKET...
LISZT UP 1...
BEETHOVEN DOWN 7...
MOZART UP 13...
TCHAIKOVSKY DOWN 2...
BRAHMS UP 7...
MAHLER DOWN 3...
MUSIC FOR DRAWING ROOMS AND MUSIC HALLS AS WELL AS PALACES AND CHURCHES...
AND THERE'S AN AESTHETIC CHANGE, A NEW FOCUS ON ORIGINALITY...
GRADUALLY COMPOSERS MAKE MORE USE OF COPYRIGHT...
THERE ARE STILL POWER IMBALANCES...BUT COPYRIGHT IS A WONDERFUL TOOL!
CREATORS CAN DREAM OF GIVING UP WAITING TABLES...CONCENTRATE ON THEIR ART...
AND REACH AN AUDIENCE OF THOUSANDS, MAYBE MILLIONS...

SUMMARY

To sum up, **the law is context-dependent, and copyright's development has been driven by changing technologies, attitudes, and payment systems**. The law has not developed in isolation or as part of some grand design. Instead, it has evolved over time, in response to changes in technology, economics, and aesthetics. Today it may seem inevitable that we would support music with the system we have. But this underplays the moral, philosophical, and aesthetic ideas that informed our choices. In *Sociology of Religion*, the German sociologist Max Weber offered a useful metaphor. He wrote that while material and ideological interests may propel a train down the tracks, it is "ideas" that are the switchmen determining which track the train takes. In the copyright sphere, historically contingent ideas—such as particular notions of originality and authorship—have functioned like those switchmen, shaping what we value and wish to incentivize.

This chapter has laid out some highlights from this layered history. It has also examined the prerequisites for having property rights over music in the first place—it must be "fixed" in a static embodiment and there must be an "author." But historically not everyone could be such an author—bias and inequality often excluded people of color, women, and those without adequate resources from copyright's rewards. The next chapter moves from the external transformations that influenced copyright's trajectory to the intricacies of the law itself. You will learn about copyright's purpose, the exclusive rights it gives to authors, how it has expanded over time, and some of the difficult balancing acts it tries to manage.

2

Introduction to Copyright

Inside This Chapter

2.1 PROMOTING THE PROGRESS 25
2.2 MORAL RIGHTS? 28
2.3 *INTELLECTUAL* PROPERTY 29
2.4 MUSICAL BORROWING 30
2.5 CONTROL AND FREEDOM 38
2.6 THE FIRST COPYRIGHT LAWS 43
2.7 THE EXCLUSIVE RIGHTS 44
2.8 THE COPYRIGHT TERM 49
2.9 COPYRIGHT'S PRACTICAL REACH 49
2.10 A MUSIC COPYRIGHT TIMELINE 50

Chapter One covered the preconditions for music copyright and the layers of history leading up to the copyright system we have today. This chapter will offer an introduction to the law itself, beginning with the theory behind copyright and the difference between *intellectual* and physical property. You will learn how copyright seeks to foster creativity, and about some of the challenges that it faces in doing so, including the tension between property rights and longstanding traditions of musical borrowing or the need to balance creative control and artistic freedom. You will also learn about its basic rules. We will then chronicle how the law has developed since its inception, including some of the dramatic ways it has changed over time. The chapter will conclude with an illustrative timeline.

2.1 PROMOTING THE PROGRESS

In the United States, the "why" behind copyright law is actually set out in our Constitution. Some of its Framers had discussed different ways to encourage innovation and the spread of learning, just as you considered different ways of promoting music in Musicland. They even considered grants of land to innovators. But they finally settled on *copyrights* and *patents*. Copyrights cover creative works like books, plays, paintings, photographs, and, of course, music. Patents cover inventions and discoveries. Here is the language that they put into the Constitution.

> Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

As applied to copyright, this clause gives Congress power to grant "exclusive rights" for "limited times" to "authors" over their "writings"—in order to "promote the progress."[4] While it took some time for music and music's changing technologies to be assimilated into copyright, in today's world songwriters and, in some cases, performers are the "authors" and their compositions and recordings are the "writings."

How does this limited period of exclusivity "promote the progress"? A song is not like a bottle of beer. If 99 of us each want a bottle of beer, you would need "99 bottles of beer on the wall," or at least on the bar. If you're making that beer, you can sell 99 bottles. But a single song can satisfy all 99 of us at the same time. In economic terms, the song is "non-rival"—I can listen to or sing the song and that does not stop you from doing the same thing at the same time. (Sadly, this is not true of beer.) It is also "non-excludable"—it is difficult to stop one unit of the song from satisfying lots of users. So, if you're making music, what's to stop someone from copying or performing or adapting your song without paying you? And if you can't get paid, what will motivate you to make music and put it out there? Why not turn to beermaking instead?

Copyright steps in and gives songwriters and performers **exclusive rights** over their music, setting up the conditions for a *market* where they can control and get paid for it. Those rights have evolved over time; you will learn about today's framework in the coming chapters. Frequently artists transfer those rights to publishers and record labels, who can then rely on copyright to earn money for their role in producing, marketing, and disseminating the music. **All of this *promotes the progress* by providing *an economic incentive to create and distribute* new works.** That's the theory, at least, and as we will see it is often true.

[4] Historical aside: when the Framers of the Constitution talked about "the progress of science and useful arts," "science" referred to the kind of knowledge and learning promoted by copyrights, while "useful arts" referred to the kind of useful inventions promoted by patents.

The ultimate goal of the system is **utilitarian**: to benefit the public with all of this creative output. Here is how the Supreme Court explained it:

> "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

Part of the way copyright achieves this goal is by ensuring that rights last for "limited times," so that when they expire, works go into the public domain, where there is unfettered access to our cultural heritage. Quoting from the Supreme Court again:

> "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

At its best, **copyright gives us a decentralized and democratized way of encouraging creativity**. The choices about what music gets supported will not be made by the church, or nobility, or government, or wealthy benefactors. In our own Musicland, the choice is made by *us*: by what we listen to, by whose shows we want to see. In this copyright-enabled marketplace, the artist with the most popular songs and shows will receive the greatest financial reward. In 2025, the highest-earning musicians were The Weeknd, Taylor Swift, Beyoncé, and Bad Bunny.

Of course, this is an idealized vision of copyright. The reality is more complicated. Not all musicians benefit from copyright, and copyright's incentives are not always the driver for "promoting the progress." Many artists have other motivations for making and sharing their music—maybe they do it for the love of it, or because it brings non-financial rewards. For some artists, exclusive rights can end up *impeding* creativity by preventing them from building upon other music. And on the industry side, the internet has upended traditional

The Public Domain

When copyrights expire, creative works enter what is called the *public domain*, where anyone is free to use or build upon them, without permission or fee. Why is this important? During the copyright term, many works are out of reach for artists, students, teachers, and others who cannot pay for them or track down the copyright owners to get permission. When music goes into the public domain, anyone can rediscover and breathe new life into it—youth orchestras can afford to perform the symphonies, budding filmmakers can use the songs in their soundtracks, amateur animators can set their own "Fantasia" to the compositions. As Karyn Temple, a former head of the U.S. Copyright Office, explained it: the public domain "is part of copyright's life cycle—the next stage of life for that creative work." The public domain used to be more robust—until 1978, the maximum copyright term was 56 years, so anything older than that was open to all. Now, only works from over 95 years ago are conclusively in the public domain. Feel free to use something from the early 1920s in your soundtrack, but anything created during your lifetime will probably remain copyrighted. (We will cover the copyright term in more detail later in this book.)

business models that were built upon copyright's scaffolding. At the end of the day, has the system worked as intended? In the coming chapters, you will have many opportunities to consider this question.

2.2 MORAL RIGHTS?

Anita has a different take on *why* she should have rights over her work. Like many artists, she feels very close to her creations. She thinks they are *hers* because she *wrote* them—because they came from somewhere deep inside of her—not because the law wants to give her incentives to create them. She believes she should have an innate right to control what people do with her songs.

Anita would like to have what are called "moral rights." The term is a translation of the French *droit moral*, the artist's creative claims over her own creation, not a reference to what we traditionally think of as morality or ethics. "Moral" rights are different from "economic" rights that let you get paid for uses of your work. They focus on an author's personal and reputational connection to her creation. Two key moral rights are **attribution**—the right to receive credit for your work, and **integrity**—the right to prevent alterations or distortions of your work that are "prejudicial to the author's honor or reputation." Unlike economic rights, moral rights are not transferable; they remain with the author.

For many of us, the rationale behind moral rights—that artists have inherent or "natural" rights over their creations—is intuitive and appealing. But there is still the question of what shape those rights should take. With the utilitarian rationale discussed earlier, the rights are a means to an end. If the goal is to "promote the progress," this tells you that rights need to last for "limited times," and that they need to balance control with freedom. With moral rights, the right to one's art is an *end in itself*, and it is not clear what degree of control follows from that. How long should moral rights last? Only during the life of the author, or should they be passed down generation after generation, like Grandma's heirlooms or the family farm? If Mozart had moral rights, could his heirs stop the movie *The Big Lebowski* from using Mozart's *Requiem*, or shut down the Mozart for Babies channels on YouTube? How would moral rights interact with freedom of speech? Can authors or their heirs censor parodies or *homages* that they think diminish the author's reputation? Can comedians remake songs into spoofs of celebrities and politicians? Saying one believes in moral rights does not answer any of those questions.

While some countries have broad moral rights regimes, US copyright law does not. For example, if you have a US copyright over a song, that does not give you the rights of attribution and integrity.[5] Our system centers around *economic* rights, with the goal of encouraging creativity. As you will see, these economic rights give artists and companies

[5] US copyright law does have a provision called the "Visual Artists Rights Act" that provides moral rights for works of visual art such as paintings and sculpture, but not music. Outside of copyright law, there are some other ways that musicians *might* be able to make claims similar to those provided by moral rights—for example, through contractual provisions, or the "personality rights" under state law—but the scope and availability of these approaches is unclear.

long-lasting control over copying, distributing, publicly performing, and making "derivative works" based on their music.

2.3 *INTELLECTUAL* PROPERTY

Copyright is a form of "intellectual property," which we discussed briefly in the Introduction. Before we get to the specific rights that copyright confers, it is important to understand the differences between intellectual property and physical property.

What does it mean to have "property" rights over a song? We have already talked about some of the developments that made it possible, in the Western tradition, to think about "owning" a song. Here "owning" refers to owning music as your "property," as opposed to it being part of your community's oral tradition, or something that existed without the "technologies" of notation or recording that allow us to maintain the existence of a single thing through time.

What is the difference between owning music and, say, owning a car or a sweater? You might have a pretty good sense of what property rights and ownership mean when it comes to a car. You know that you can sell your Ford Mustang, or give it to someone, or turn it into a giant sculpture you put up in front of your dorm until the university asks for it to be removed. You could even imagine more complex arrangements—maybe you and your roommate split the ownership of the car, or maybe you rent it for a limited period of time, after which you have to return it. So far, that seems pretty simple: ownership of a physical thing that can be bought, sold, gifted, leased—all subject to the rules your state sets up for how to own a car, such as it needs to be inspected and, even though you own it, you are not allowed to drive at 100 mph on a public road. Law school teaches you that things are actually more complex than that, but at least we understand the basics.

Back to the song. **There are some significant differences between that *physical* property and *intellectual* property.** Here are several key things to realize. All of these features inform how copyright tries to promote, rather than impede, creativity.

- First, as just mentioned, in economic terms a song—unlike a bottle of beer—is **non-rival and non-excludable**. We can all enjoy the same song at the same time. This is where copyright comes in. The law gives copyright owners the right to *exclude* people from making certain uses of their song without permission, which allows them to get paid for their art. The goal is to provide an economic incentive to create and distribute creative works.
- Second, **you need other people's creative input in order to make your own creative output**. You would be hard pressed to create your own song without drawing on the music of the past, whether it is a pattern of notes or chord progressions, a genre, or a certain rhythm. As one judge put it: "Culture…grows by accretion, each new creator building on the works of those who came before." Physical property is different, at least as a matter of degree: I don't need your sweater in order to make my own sweater. But I cannot create *music* out of whole cloth. Therefore, by design, *copyright is not an "absolute" property right*.

- Third, this is why copyright promotes creativity by making sure some things are owned, and some things remain free. But, because the song is *intangible*, **the boundaries, or "metes and bounds," of what you own are not necessarily clear.** With a plot of land, there are property lines. With your sweater, you can see the *thing* that you own. With music, there's no map showing where ownership begins and ends, and drawing that line often turns out to be tricky. Unlike a sweater, saying you "own" a song does not mean that you own every fiber of that song. Trying to figure out which parts of your song are your "property" is an important, and challenging, exercise.

2.4 MUSICAL BORROWING

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.
>
> –Supreme Court Justice Joseph Story

The need for creative inputs and the challenge of figuring out what aspects of music can be owned both bring us to *musical borrowing*. The previous chapter discussed the dissonance between copyright's notion of unique authorial genius and the fact that—true to Justice Story's words—authors necessarily build upon prior works. In music, there is a long, celebrated, and well-studied tradition of borrowing. Throughout most of musical history, this borrowing was both *legal* and culturally *accepted.* It was just part of what composers did, not cause for a lawsuit. In *Der vollkommene Capellmeister* ("The Perfect Chapel Master"), a 1739 handbook for composers, Johann Mattheson wrote:

> Borrowing is permissible; but one must return the object borrowed with interest, i.e., one must so construct and develop imitations that they are prettier and better than the pieces from which they are derived.

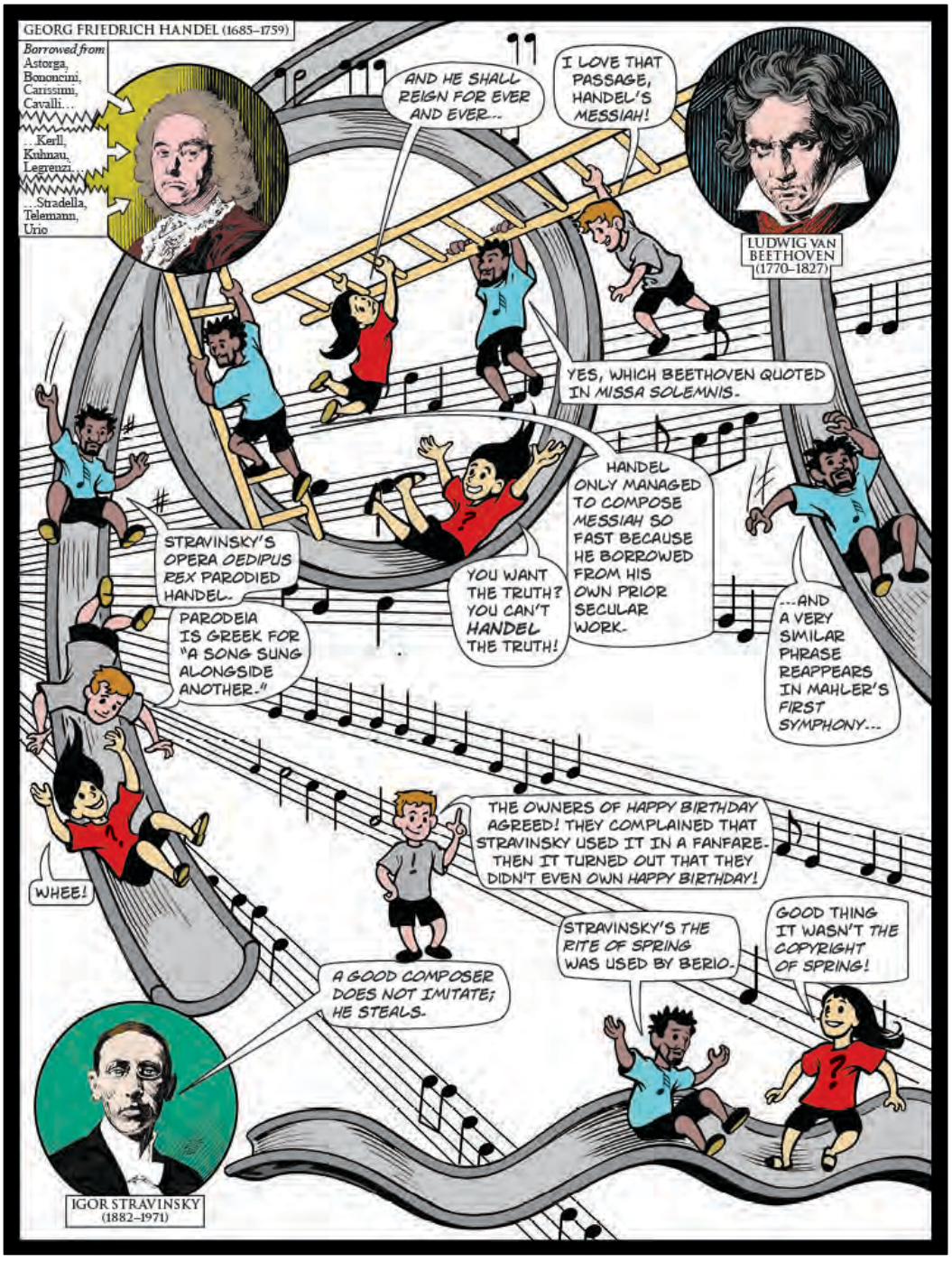
In other words, while rote imitation was not acceptable, creatively reshaping music was fine.

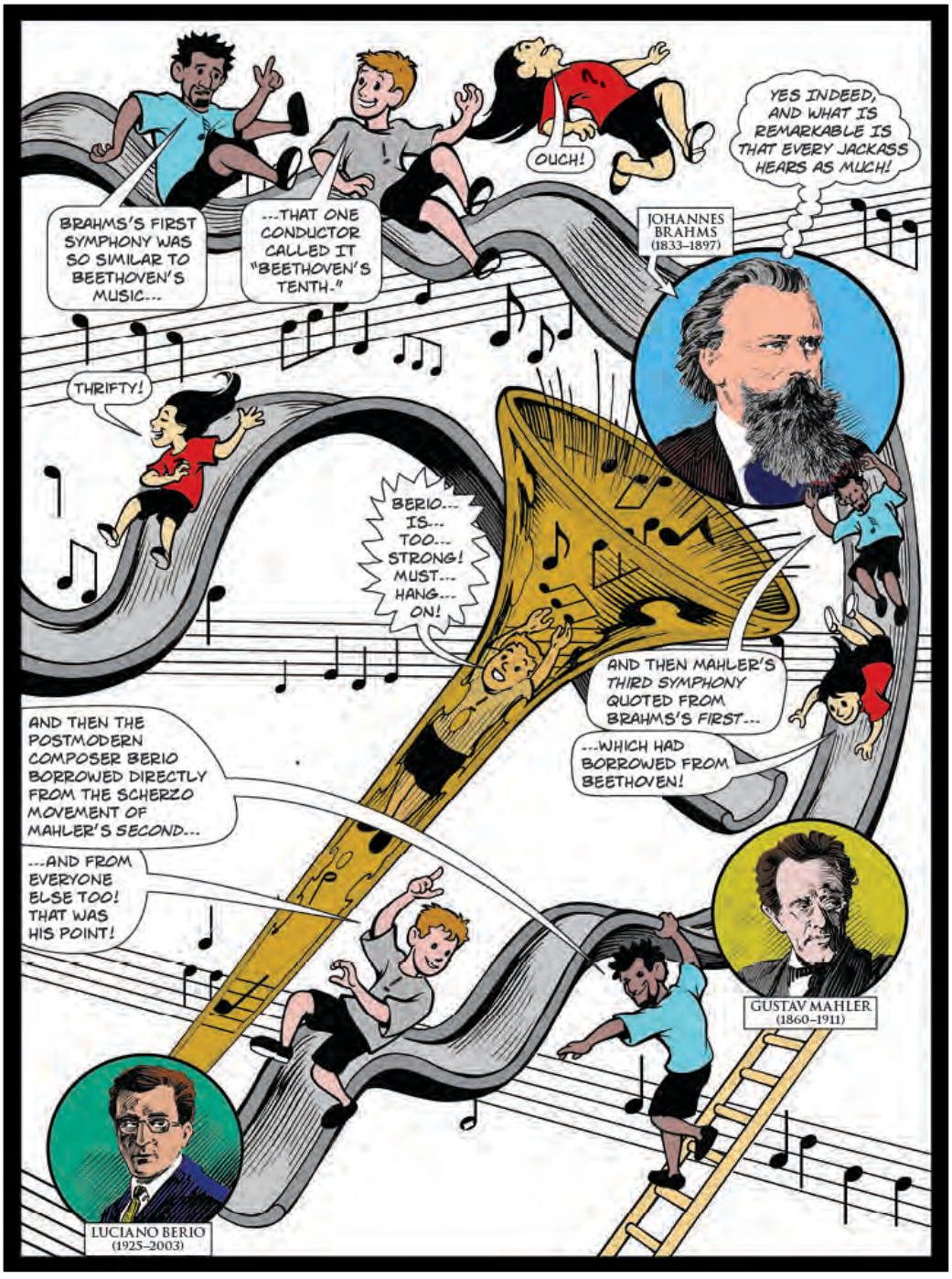
What is permissible and impermissible has changed over time. Early copyright law only prevented others from printing and selling the sheet music. For the most part, borrowing was not affected—you were free to use parts of someone else's composition in your own. Things are different now. These days, if I want to use your melody, I probably have to get your permission. As you will discover, one court even said that hip hop artists have to get permission to sample anything more than *one note*, though this rule is hotly disputed. (We will cover this in Chapter Nine.)

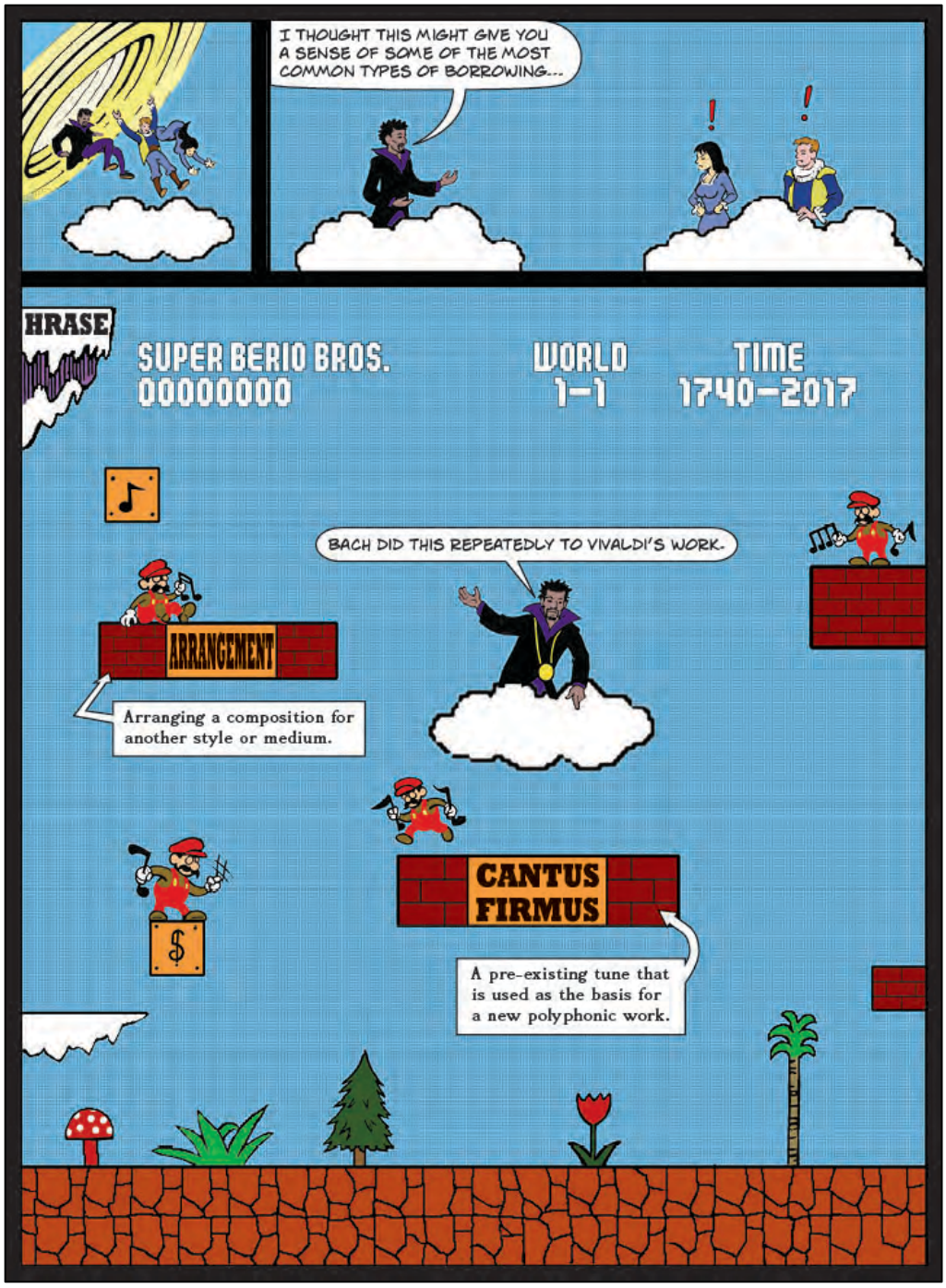
> Musical borrowing and derivation are age-old practices that existed in every society since music began.
>
> —Dr. Anthony Kelley, music professor at Duke University

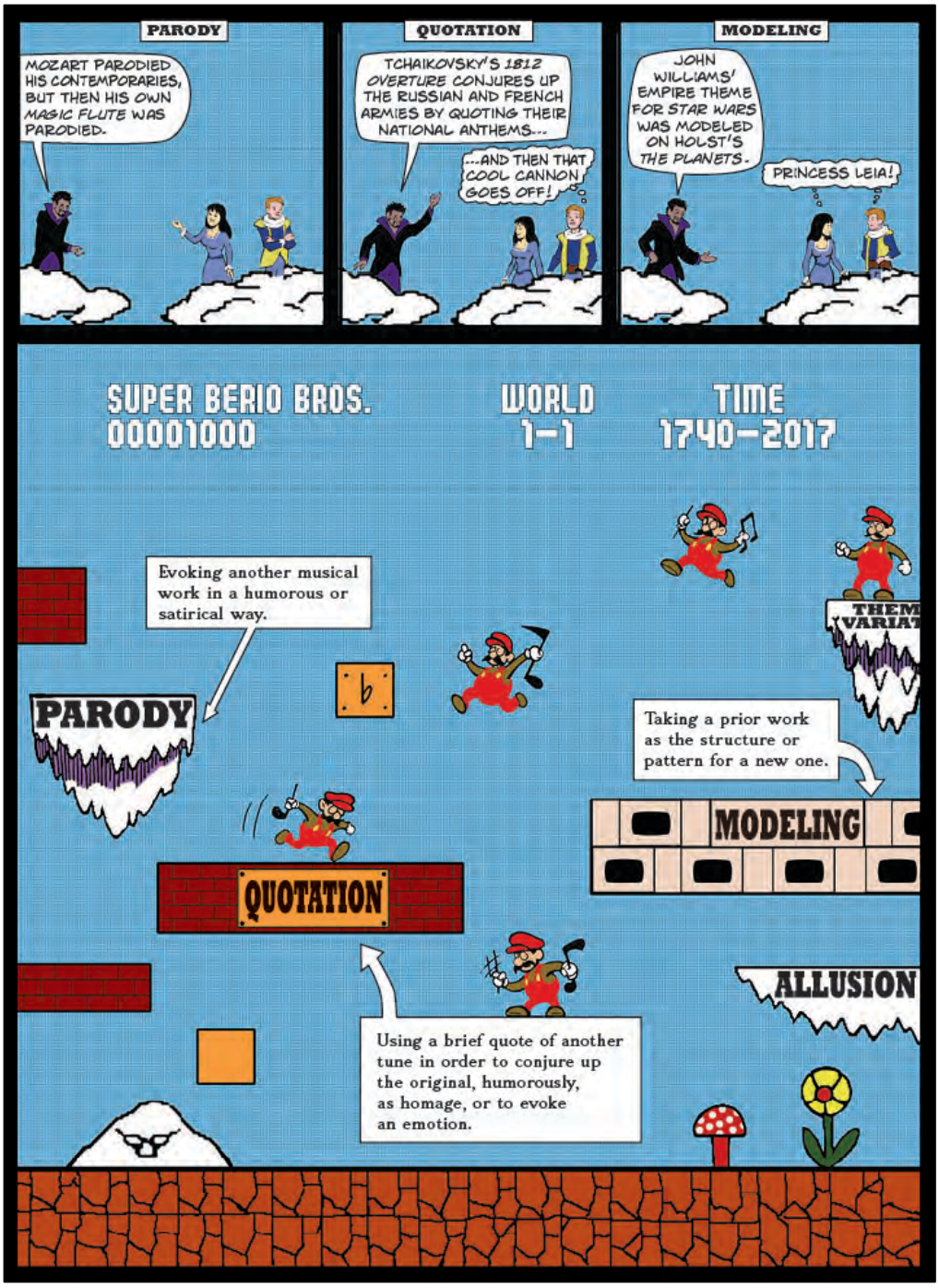
To get a sense of historical borrowing practices, here are three comic excerpts. First is an illustration of a "Six Degrees of Inspiration" board game that combines a traditional "Chutes and Ladders" game with the idea of "Six Degrees of Separation." Follow the strands of musical borrowing that connect the six famous composers—moving clockwise from the top left, Handel (and his predecessors), Beethoven, Brahms, Mahler, Berio, and Stravinsky. Next is an illustration based on another game that you might know, Super Mario Bros. It is called "Super Berio Bros," and it provides a taxonomy of different kinds of musical borrowing, culled from musicologists' extensive study of the subject. The third excerpt takes us to the United States in the early 1800s and shows how borrowing is as American as apple pie. As you read these pages, listen to the music that they discuss. Can you hear the borrowing? The new contributions?

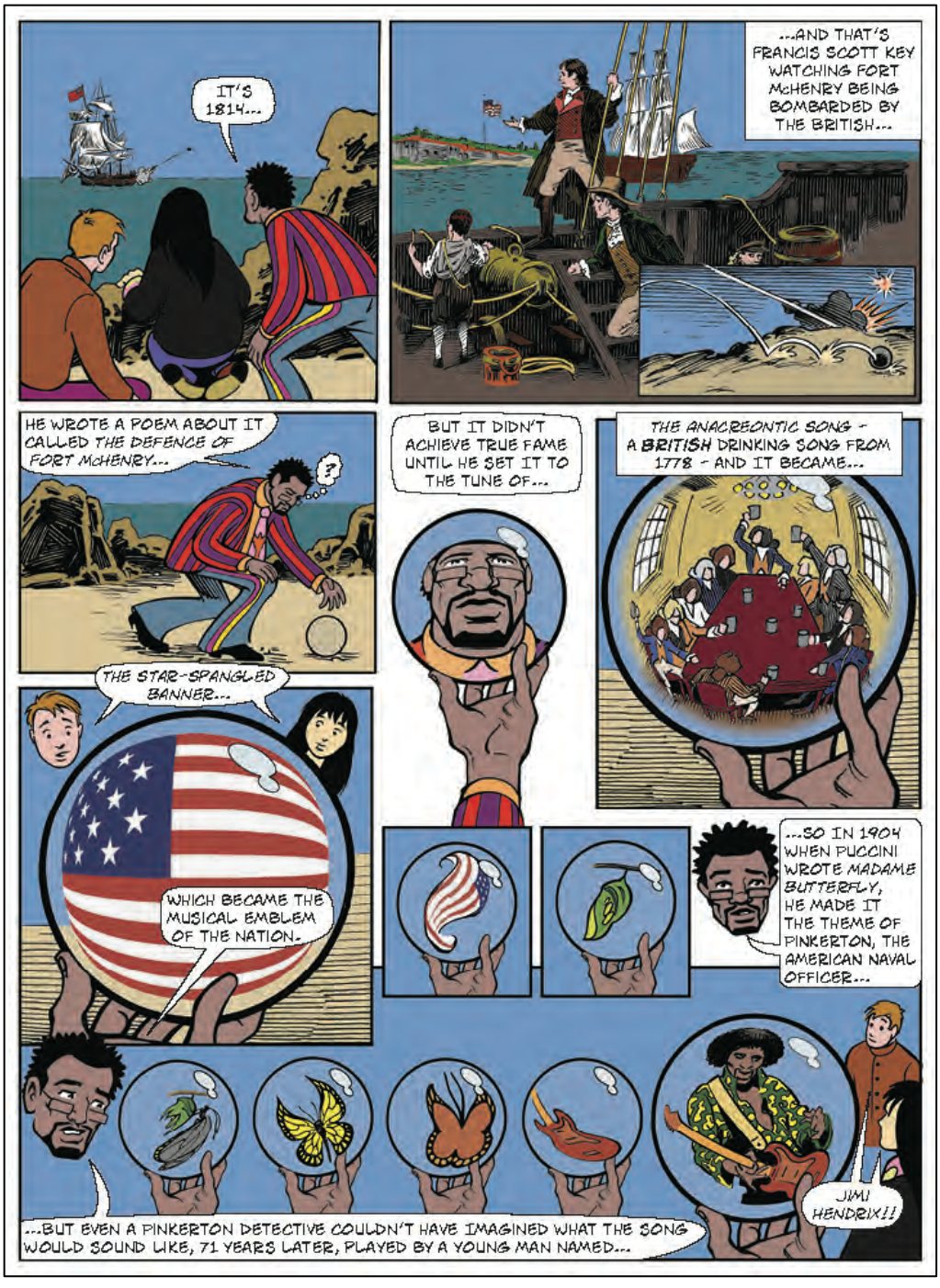
Listen to the music

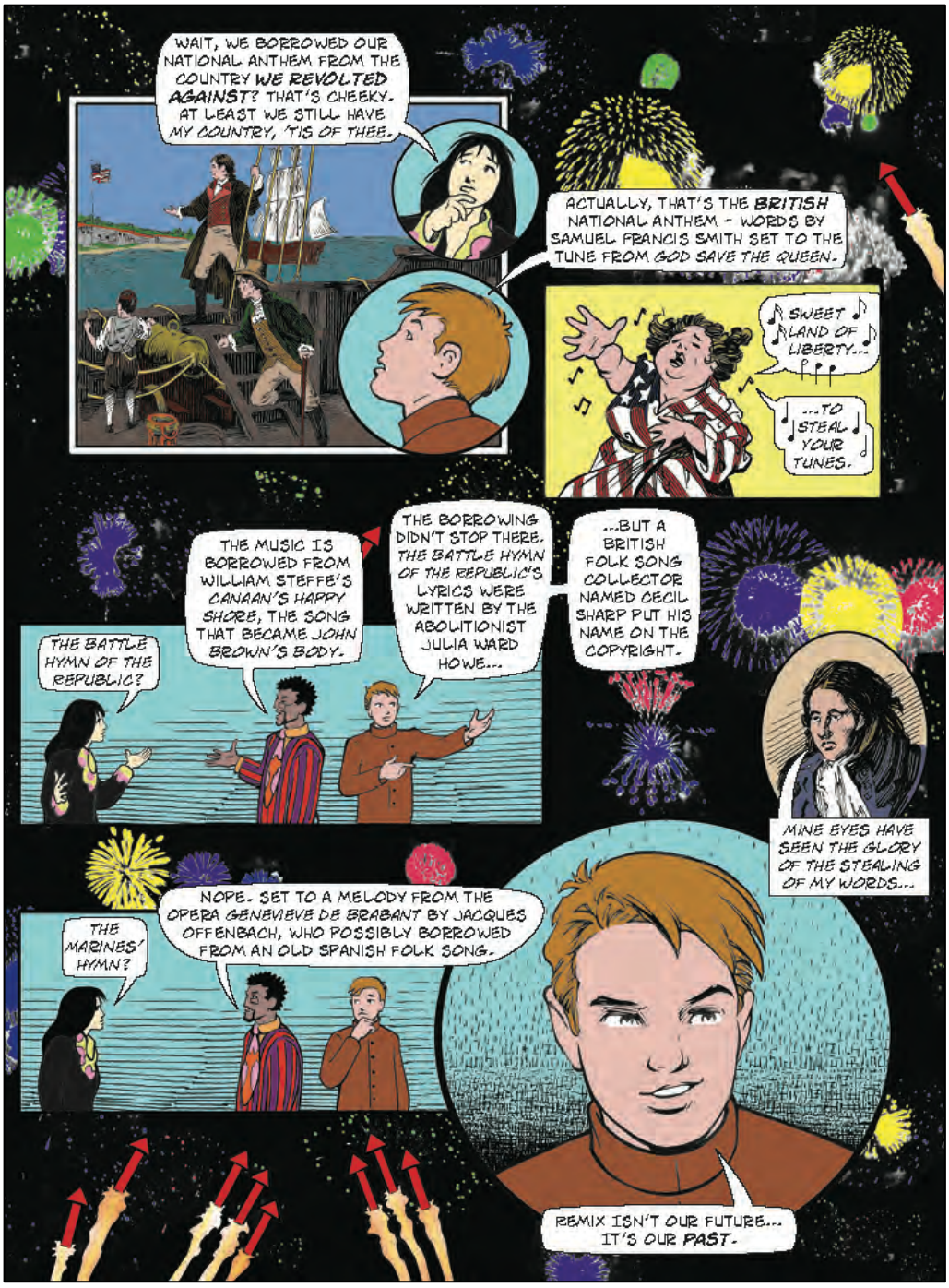

GEORG FRIEDRICH HANDEL (1685–1759)
Borrowed from Astorga, Bononcini, Carissimi, Cavalli…
…Kerll, Kuhnau, Legrenzi…
…Stradella, Telemann, Urio
AND HE SHALL REIGN FOR EVER AND EVER…
I LOVE THAT PASSAGE, HANDEL'S MESSIAH!
LUDWIG VAN BEETHOVEN (1770–1827)
YES, WHICH BEETHOVEN QUOTED IN MISSA SOLEMNIS.
HANDEL ONLY MANAGED TO COMPOSE MESSIAH SO FAST BECAUSE HE BORROWED FROM HIS OWN PRIOR SECULAR WORK.
YOU WANT THE TRUTH? YOU CAN'T HANDEL THE TRUTH!
STRAVINSKY'S OPERA OEDIPUS REX PARODIED HANDEL.
PARODEIA IS GREEK FOR "A SONG SUNG ALONGSIDE ANOTHER."
…AND A VERY SIMILAR PHRASE REAPPEARS IN MAHLER'S FIRST SYMPHONY…
THE OWNERS OF HAPPY BIRTHDAY AGREED! THEY COMPLAINED THAT STRAVINSKY USED IT IN A FANFARE. THEN IT TURNED OUT THAT THEY DIDN'T EVEN OWN HAPPY BIRTHDAY!
WHEE!
STRAVINSKY'S THE RITE OF SPRING WAS USED BY BERIO.
GOOD THING IT WASN'T THE COPYRIGHT OF SPRING!
A GOOD COMPOSER DOES NOT IMITATE; HE STEALS.
IGOR STRAVINSKY (1882–1971)


BRAHMS'S FIRST SYMPHONY WAS SO SIMILAR TO BEETHOVEN'S MUSIC...
...THAT ONE CONDUCTOR CALLED IT "BEETHOVEN'S TENTH."
OUCH!
YES INDEED, AND WHAT IS REMARKABLE IS THAT EVERY JACKASS HEARS AS MUCH!
JOHANNES BRAHMS (1833–1897)
THRIFTY!
BERIO... IS... TOO... STRONG! MUST... HANG... ON!
AND THEN MAHLER'S THIRD SYMPHONY QUOTED FROM BRAHMS'S FIRST...
...WHICH HAD BORROWED FROM BEETHOVEN!
AND THEN THE POSTMODERN COMPOSER BERIO BORROWED DIRECTLY FROM THE SCHERZO MOVEMENT OF MAHLER'S SECOND...
...AND FROM EVERYONE ELSE TOO! THAT WAS HIS POINT!
GUSTAV MAHLER (1860–1911)
LUCIANO BERIO (1925–2003)

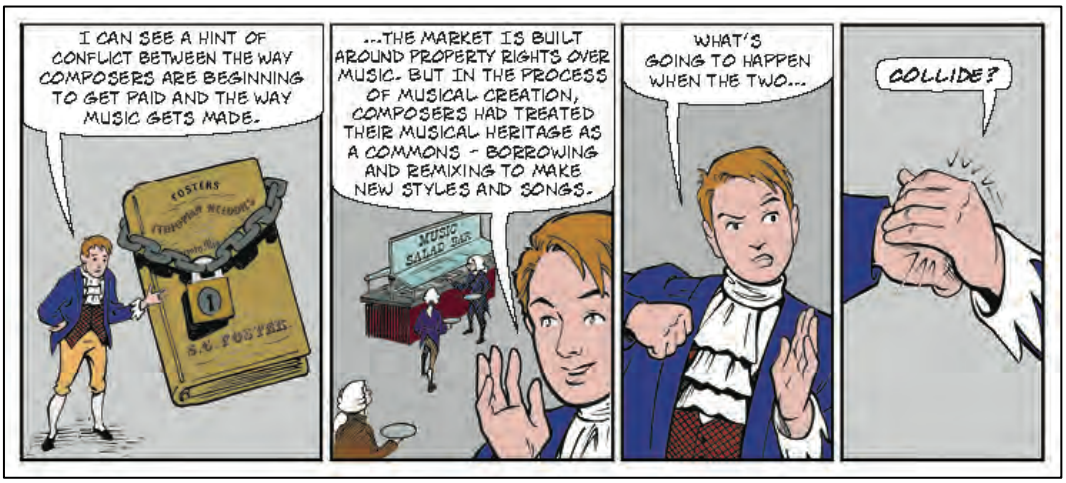

I THOUGHT THIS MIGHT GIVE YOU A SENSE OF SOME OF THE MOST COMMON TYPES OF BORROWING...
!
!
HRASE
SUPER BERIO BROS.
00000000
WORLD
1-1
TIME
1740-2017
BACH DID THIS REPEATEDLY TO VIVALDI'S WORK.
ARRANGEMENT
Arranging a composition for another style or medium.
CANTUS FIRMUS
A pre-existing tune that is used as the basis for a new polyphonic work.


PARODY
MOZART PARODIED HIS CONTEMPORARIES, BUT THEN HIS OWN MAGIC FLUTE WAS PARODIED.
QUOTATION
TCHAIKOVSKY'S 1812 OVERTURE CONJURES UP THE RUSSIAN AND FRENCH ARMIES BY QUOTING THEIR NATIONAL ANTHEMS...
...AND THEN THAT COOL CANNON GOES OFF!
MODELING
JOHN WILLIAMS' EMPIRE THEME FOR STAR WARS WAS MODELED ON HOLST'S THE PLANETS.
PRINCESS LEIA!
SUPER BERIO BROS.
00001000
WORLD
1-1
TIME
1740-2017
Evoking another musical work in a humorous or satirical way.
PARODY
Taking a prior work as the structure or pattern for a new one.
MODELING
QUOTATION
ALLUSION
Using a brief quote of another tune in order to conjure up the original, humorously, as homage, or to evoke an emotion.


IT'S 1814...
...AND THAT'S FRANCIS SCOTT KEY WATCHING FORT McHENRY BEING BOMBARDED BY THE BRITISH...
HE WROTE A POEM ABOUT IT CALLED THE DEFENCE OF FORT McHENRY...
?
BUT IT DIDN'T ACHIEVE TRUE FAME UNTIL HE SET IT TO THE TUNE OF...
THE ANACREONTIC SONG - A BRITISH DRINKING SONG FROM 1778 - AND IT BECAME...
THE STAR-SPANGLED BANNER...
WHICH BECAME THE MUSICAL EMBLEM OF THE NATION.
...SO IN 1904 WHEN PUCCINI WROTE MADAME BUTTERFLY, HE MADE IT THE THEME OF PINKERTON, THE AMERICAN NAVAL OFFICER...
...BUT EVEN A PINKERTON DETECTIVE COULDN'T HAVE IMAGINED WHAT THE SONG WOULD SOUND LIKE, 71 YEARS LATER, PLAYED BY A YOUNG MAN NAMED...
JIMI HENDRIX!!


WAIT, WE BORROWED OUR NATIONAL ANTHEM FROM THE COUNTRY WE REVOLTED AGAINST? THAT'S CHEEKY. AT LEAST WE STILL HAVE MY COUNTRY, 'TIS OF THEE.
ACTUALLY, THAT'S THE BRITISH NATIONAL ANTHEM - WORDS BY SAMUEL FRANCIS SMITH SET TO THE TUNE FROM GOD SAVE THE QUEEN.
SWEET LAND OF LIBERTY...
...TO STEAL YOUR TUNES.
THE BORROWING DIDN'T STOP THERE. THE BATTLE HYMN OF THE REPUBLIC'S LYRICS WERE WRITTEN BY THE ABOLITIONIST JULIA WARD HOWE...
...BUT A BRITISH FOLK SONG COLLECTOR NAMED CECIL SHARP PUT HIS NAME ON THE COPYRIGHT.
THE MUSIC IS BORROWED FROM WILLIAM STEFFE'S CANAAN'S HAPPY SHORE, THE SONG THAT BECAME JOHN BROWN'S BODY.
THE BATTLE HYMN OF THE REPUBLIC?
MINE EYES HAVE SEEN THE GLORY OF THE STEALING OF MY WORDS...
NOPE. SET TO A MELODY FROM THE OPERA GENEVIEVE DE BRABANT BY JACQUES OFFENBACH, WHO POSSIBLY BORROWED FROM AN OLD SPANISH FOLK SONG.
THE MARINES' HYMN?
REMIX ISN'T OUR FUTURE... IT'S OUR PAST.

Of course, musical borrowing was not limited to classical traditions or our national anthem. Jazz improvised on familiar melodies, turning them into something new. Whole genres were built from earlier ones—rock and roll merged rhythm and blues and country; soul fused blues and gospel. Hip hop artists constructed dense, complex "sonic walls" from dozens of samples—a fragment of spoken word, a horn hit, a guitar riff, a drumbeat, all woven into a fresh collage. What happens when the law begins to regulate this borrowing? It does so in order to make sure artists can get *paid.* But in doing so, it also interferes with how music gets *made*.


I CAN SEE A HINT OF CONFLICT BETWEEN THE WAY COMPOSERS ARE BEGINNING TO GET PAID AND THE WAY MUSIC GETS MADE.
...THE MARKET IS BUILT AROUND PROPERTY RIGHTS OVER MUSIC. BUT IN THE PROCESS OF MUSICAL CREATION, COMPOSERS HAD TREATED THEIR MUSICAL HERITAGE AS A COMMONS - BORROWING AND REMIXING TO MAKE NEW STYLES AND SONGS.
WHAT'S GOING TO HAPPEN WHEN THE TWO...
COLLIDE?
FOSTERS
S.C. FOSTER
MUSIC SALAD BAR

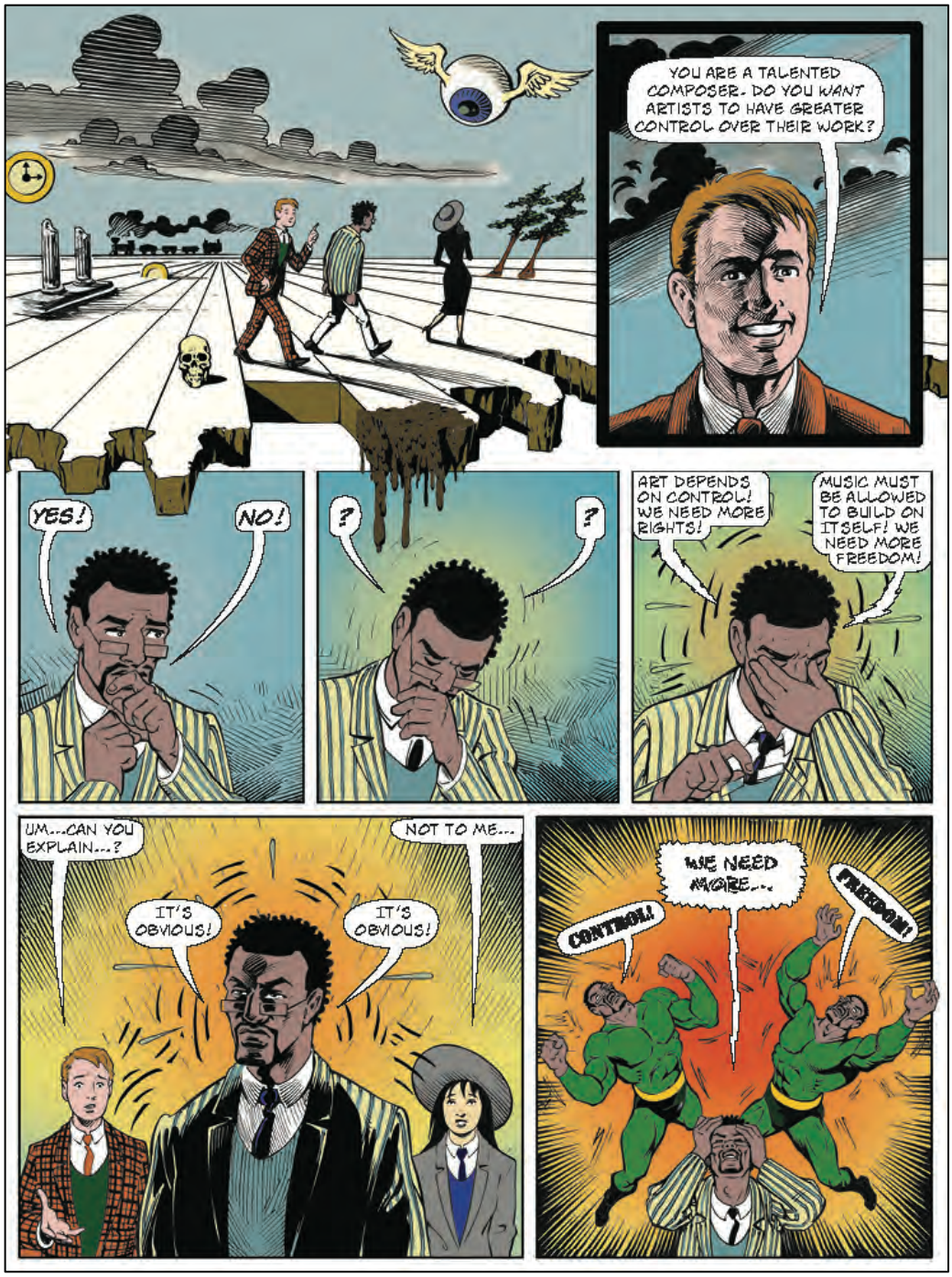
What happens indeed? We will find out in subsequent chapters.

2.5 CONTROL AND FREEDOM

This brings us to the balance between providing *control* over creative works and preserving the *freedom* to build upon certain aspects of those creative works. Remember the question from the Introduction that you considered as music czar: "How do you draw a line between the stuff that is owned, and the stuff future musicians need to make more music themselves?" In order to "promote the progress," copyright's exclusive rights have to be limited not only in time, but in scope. I want to own *my* song, but I can't create it without using raw material contained in other songs—rhythms, chord progressions, melodic patterns, the basic building blocks of music. If those building blocks are owned by someone else, we would actually get less music, not more. Therefore, in its quest to encourage creativity, copyright law has to strike a delicate balance. **It tries to both protect artistic output and to ensure the availability of artistic inputs that are necessary to create in the first place. It does this by giving rights holders control through exclusive rights, but also preserving freedom through exceptions to those rights that keep raw materials open for future artists to use.** This is a perennial balancing act that we will revisit throughout this book. Copyright's exclusive rights—the control side of the equation—will be introduced later in this chapter. Chapters Four and Five will delve, in more detail, into what can be owned under

copyright law, and what remains free for all musicians to use, and Chapters Seven and Eight will look at how that balance played out in three famous legal cases.

How do artists straddle the simultaneous desire for control and freedom? Let's hear from one of our comic book characters, who is conflicted…



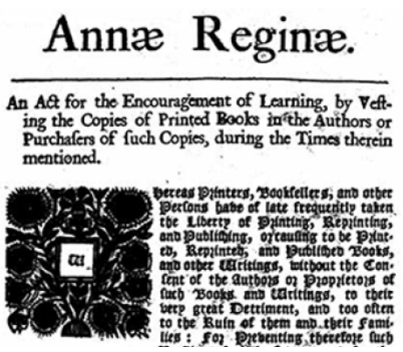
I NEED GREATER CONTROL OVER MY WORK, TO MAKE A LIVING, TO PROTECT THE INTEGRITY OF MY ART...!
I NEED MORE FREEDOM TO BUILD ON THE PAST! MORE CONTROL IS THE LAST THING I NEED. LOOK AT ALL THE JAZZ THAT'S BUILT ON GERSHWIN'S I GOT RHYTHM. YOU THINK THOSE CHORD CHANGES SHOULD BE LICENSED?
YOU JUST DON'T WANT TO MAKE THE EFFORT TO CREATE ORIGINAL MUSIC!
YOU JUST WANT TO DENY EVERYONE ELSE THE FREEDOMS YOU HAD YOURSELF!

PIRATE!
INGRATE!
PLAGIARIST!
CONTROL FREAK!
YOU'RE NO REAL MUSICIAN!
NOW YOU'VE GONE TOO FAR!!!!
STARVING...COMPOSER ...GARRET!
SOULLESS... RECORD COMPANY ...ACCOUNTANTS!
ARTISTIC... INTEGRITY!
FREE... CULTURE!
PURITY!
PARODY!
SWOOSH!

YOU'LL...DESTROY...MUSIC... AS...WE...KNOW...IT!!!
WELL, I HAVE CONFLICTING FEELINGS ABOUT IT.
WHY DO THE INTERESTING GUYS ALL HAVE IDENTITY ISSUES...?
SIGH!

2.6 THE FIRST COPYRIGHT LAWS

We have now covered the purpose of copyright law, the nature of the *intellectual* property that it covers, and its balancing act between control and freedom. It is time to begin our exploration of the law itself. As illustrated by the comic book timeline, copyright was a relatively recent invention; musical copyright more recent still. And since its invention it has changed a *lot* over the years. Let's trace its early development.

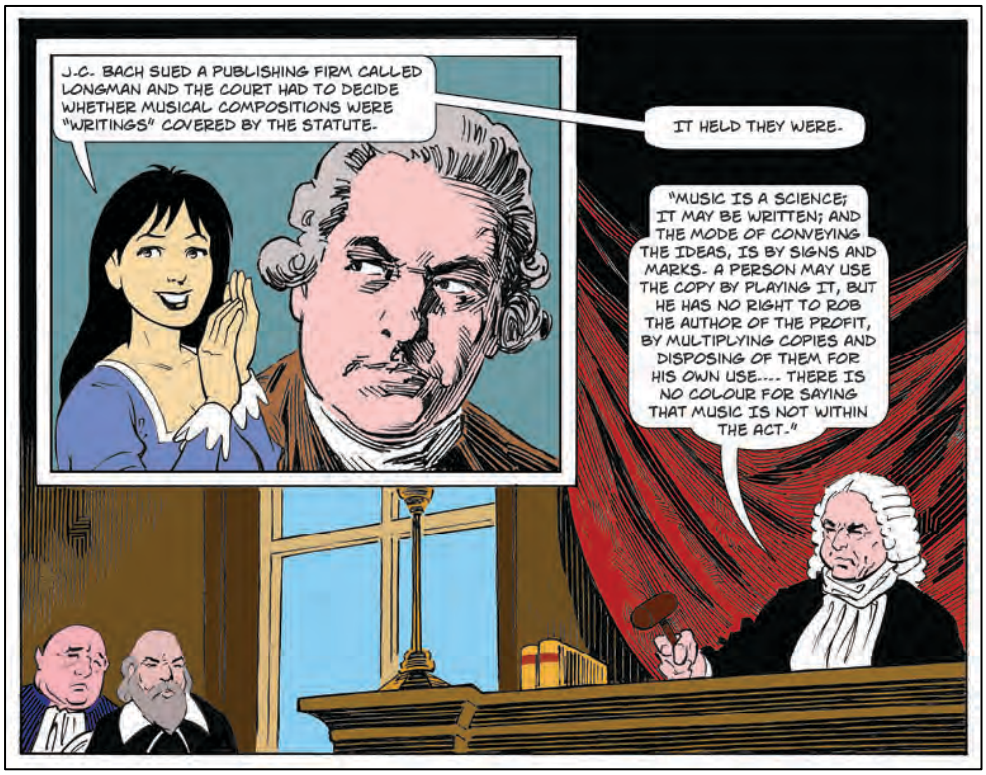

Annæ Reginæ.

An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

Whereas Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing thereof for

The Statute of Anne (Photo 2.1)

The first true copyright law was England's "Statute of Anne," enacted in 1710 (Photo 2.1). Labeled "An Act for the Encouragement of Learning," it gave *authors* legal rights over their creations. Before this law, rights were granted to printers instead of authors. This had the effect of giving each member of the publishing guild a monopoly over "their" titles. Only members of the guild could print and each member of the guild was bound not to poach on the titles of its rivals. This scheme also allowed government censorship, because rights were given in exchange for the guild's refusal to print materials considered seditious or heretical. So the new author-focused law was a big improvement! At first, it wasn't clear whether the authors of *music*—as opposed to books—got any rights under the statute. Then in 1777, Johann Christian Bach, the eighteenth child of Johann Sebastian Bach, sued a publishing firm called Longman for selling his compositions without permission. Here is what happened.


J.C. BACH SUED A PUBLISHING FIRM CALLED LONGMAN AND THE COURT HAD TO DECIDE WHETHER MUSICAL COMPOSITIONS WERE "WRITINGS" COVERED BY THE STATUTE.
IT HELD THEY WERE.
"MUSIC IS A SCIENCE; IT MAY BE WRITTEN; AND THE MODE OF CONVEYING THE IDEAS, IS BY SIGNS AND MARKS. A PERSON MAY USE THE COPY BY PLAYING IT, BUT HE HAS NO RIGHT TO ROB THE AUTHOR OF THE PROFIT, BY MULTIPLYING COPIES AND DISPOSING OF THEM FOR HIS OWN USE.... THERE IS NO COLOUR FOR SAYING THAT MUSIC IS NOT WITHIN THE ACT."

Notice how music was brought within the ambit of copyright because it was a "written" mode of conveying ideas, if in the form of "signs and marks" rather than words. This hearkens back to our discussion of the importance of *notation* in Chapter One.

"Maid of My Love" (Photo 2.2)

In the United States, the first copyright law was passed in 1790. Initially it covered only "maps, charts, and books." Music was added in 1831. The first copyright registration for a musical work was for "Maid of My Love" (Photo 2.2). (Although the law didn't explicitly cover music, sometimes music was registered as a book. In 1794, a registration was granted for "The Kentucky Volunteer: A New Song," written by "a lady of Philadelphia" believed to be Raynor Taylor.) The rights were very different than they are today: the law only granted "the sole right and liberty of printing, reprinting, publishing, and vending [the musical composition]…in whole or in part." In other words, it was illegal to copy and sell the sheet music without permission. You could perform it, and you could adapt or arrange it. The copyright holder had no right to stop you. You just couldn't reprint it. Musical borrowing was largely unaffected. Because copyright prevented reprinting a composition "in whole or *in part*," there were a few lawsuits over borrowing a substantial part of a prior work, but those were rare. As you will see, copyright has changed a lot since then.

2.7 THE EXCLUSIVE RIGHTS

Copyright grants authors *control* over their works in the form of *exclusive rights*. It is time to look at these rights. **Copyright is in a constant state of evolution**. The list of exclusive rights has changed over time, and quite radically so! Since 1831, new technologies and economic arrangements have led us to add new rights, piece by piece, over time. Remember from Chapter One that these rights are intended to "promote the progress" by providing copyright holders with the economic incentive to create and distribute their content. They give the copyright holder the ability to *exclude* certain uses unless they are paid for them. As a result, the rights historically focused on preserving the copyright holder's existing *commercial* interests.

The exclusive rights are important because, in the United States, **copyright is a statutory right and you only get the rights the statute says you have.** In addition, these rights are accompanied by limitations and exceptions that we will cover in later chapters. Eminem has copyrights over his songs, but he has no legal right to stop me singing them in the shower or humming them as I walk to work, because copyright only gives him a right over *public* performances, not private performances. He also cannot stop me from making a parody criticizing his lyrics if my parody is legal under copyright's "fair use" exception that we will discuss in Chapter Five.

The major revisions to our copyright law were in 1909 and 1976. The 1976 law is our current Copyright Act, and it went into effect on January 1, 1978, though there have been interim changes since then. Here is how the rights have evolved, all the way to their present iterations, and how they function in the world of the internet. We trace this evolution partly because it is fascinating to discover the history behind the law that governs our music. But it is also because this process will help to explain today's tangle of rights—over performances, recordings, derivations, synchronizing audio and video, "mechanical" reproductions, and much more—that artists and businesspeople have to navigate as they struggle to make music and bring it to the public. (In Chapter Eleven, we will take a deeper dive into this tangle; for a preview, take a look at the charts toward the end of the chapter.)

The following chart (Figure 2.1) summarizes the evolution of the exclusive rights over music. It is accompanied by a more detailed description of how each set of rights has changed, and why.

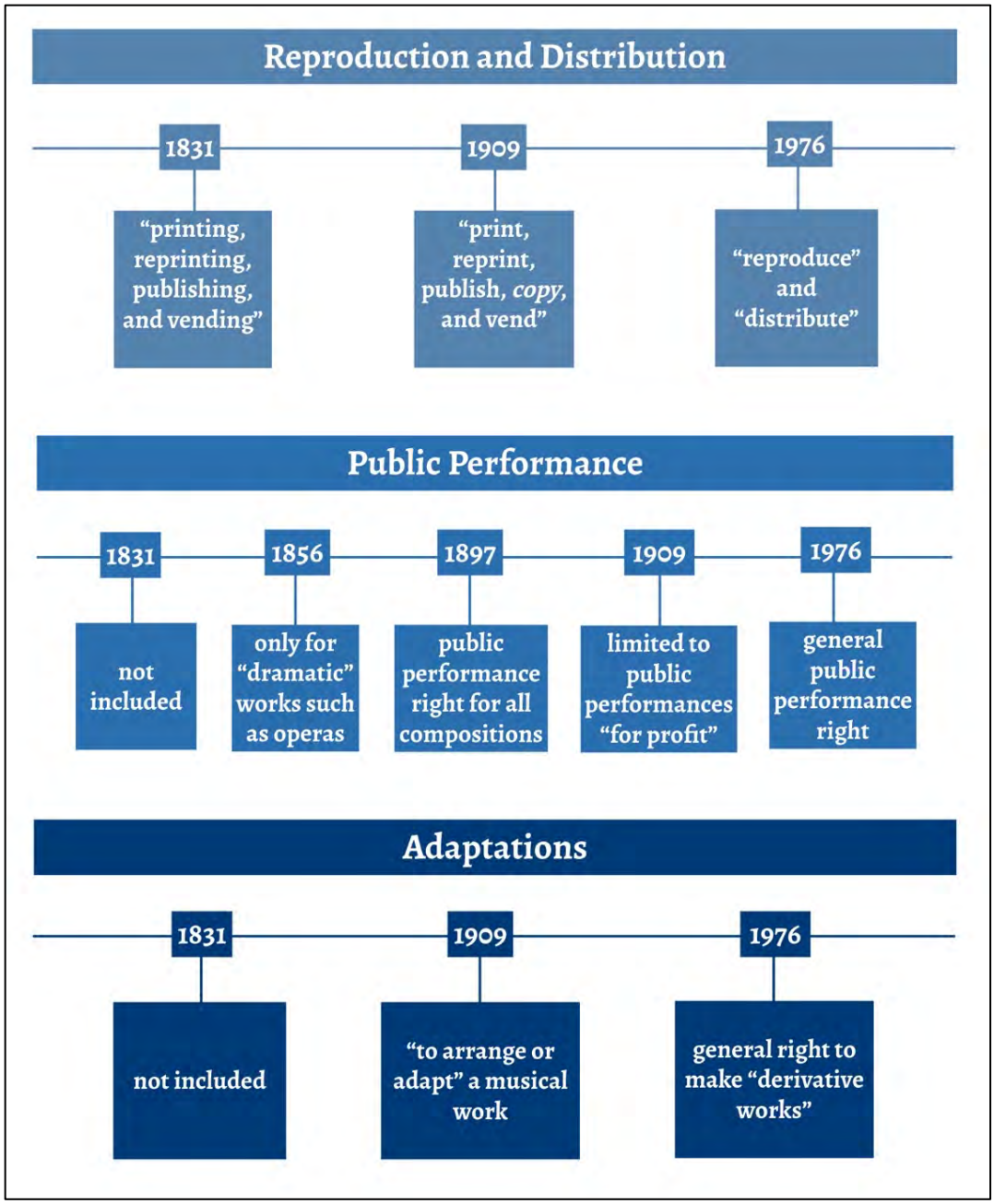


Figure 2.1

The reproduction and distribution rights. The 1831 law covered "printing, reprinting, publishing, and vending." The 1909 revision expanded this by adding the word "copy"—copyright owners had the right "to print, reprint, publish, *copy*, and vend the copyrighted work." Today's law encapsulates these activities into the broader exclusive rights to "reproduce" and "distribute" copyrighted works.

These rights go beyond the basic right to copy and sell creative works. Chapter Eleven will show how the *reproduction* right, taken literally, leads to some bizarre results in the age of the internet. A "copy" used to approximate the "thing" you would sell, whether it was

sheet music or a CD. Now you make "copies" of creative material all the time: in the course of turning on your computer, sending something in a text, posting it on Instagram, pulling up a website. Some of these copies are stable and perceptible; others are ephemeral or imperceptible. Copies live on servers around the world, in caches, in your computer's RAM (random access memory). Most of those copies are no longer part of the copyright holder's "market." Are all of them suddenly illegal? Before you say "that would be crazy," know that a court held that the RAM copy a computer repair person made when turning on the computer to fix it was copyright infringement. Seriously. Today's *distribution* right also encompasses a wider range of activities than the earlier rights over publishing and vending. You can now distribute works with the push of a button.

The distribution right is limited by something called the "first sale" doctrine that allows you to sell or rent or give away your *physical* copy or recording of a song. As long as it was legally obtained, you can do whatever you want with that CD you have. However, first sale only applies in the analog world. In the digital world, there is no first sale exception—you can resell the CD you are no longer listening to but, if instead you bought a digital download of the same music, resale is forbidden. This is because of how courts have chosen to understand the technology. Digital *distribution* involves making a *reproduction*, because you cannot transfer your download without making one of those ubiquitous "copies" we just discussed. (Some technologists tried to make this feasible, but they were sued for copyright infringement and they lost.) But under the language of the copyright statute, the first sale exception only applies to the distribution right; it does not excuse unauthorized reproductions. It was written for a world where selling or lending physical items only implicated the distribution right. But with digital items, the functional equivalent of those activities happens to implicate the separate reproduction right, and is therefore no longer insulated from liability. Notice how the reach of both the reproduction and distribution rights becomes broader in the digital world, because of how the *technology* functions.

Public performance. Initially, there was no public performance right for music. In 1856, a narrow "public performance" right was added to copyright law, but only for "dramatic" works such as plays and operas. This was necessary because those works were not generally sold as sheet music; their primary "market" was the proceeds from live performances. It was not until 1897 that a general public performance right was added for all musical works, reflecting copyright holders' markets for both sheet music and public performances. In 1909, however, an important limitation was added to the 1897 right: it was changed to include only performances that were "for profit." Congress thought that this was a better representation of copyright holders' commercial interests. The Congressional reports accompanying the change also explained that, without the "for-profit" limitation, the performance right would be "detrimental to the public" by restricting the free enjoyment of music. The adjustment was also the result of some give and take: it was the "take" that balanced the "give" in 1909 of a new right over "mechanical reproductions," which we will cover in Chapter Three.

When our current copyright law was passed in 1976, the "for-profit" limitation was removed. Now if a performance is "public," it is covered by copyright even if you are not

making money from it. If you perform a song in public for 200 people and do not charge admission, it is still a public performance. However, if you're singing in the shower (hopefully this is a "private" performance) you do not need to pay anyone for that bravura rendition of Beyoncé. Here was Congress's rationale for removing the "for-profit" requirement: "The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow."

Under our current law, there *is* a list of some public performances that are "exempt" from the right—you do not need permission if your performance is in the course of face-to-face teaching at a nonprofit institution (distance learning doesn't count, sorry Zoomers), if you're playing religious music during a worship service, if you're playing music at "an annual agricultural or horticultural fair" (for real, there's a state fair exemption), if you're playing a radio broadcast in a qualifying small bar or restaurant (not music from your own collection, just radio broadcasts), and in some other circumstances. These exemptions are *very specific* about what activities qualify, so if you think you're within one of them, you should look at the statutory provision before proceeding—the small bar and restaurant exemption, for example, has details down to the number of speakers and square footage of an eligible establishment.

Adaptations. What about creative reuses of copyrighted material? Does the law allow these, since they "promote the progress"? This too has changed a lot. The 1831 law said nothing about preventing adaptations. Only in 1909 did the law provide for an adaptation right, but its language was specific: for music, the right was only "to arrange or adapt it if it be a musical work." Again, musical arrangements and adaptations represented the *markets* that copyright holders could reserve to themselves. Then in 1976, our law added a more open-ended right to "prepare *derivative works* based upon the copyrighted work." A "derivative work" is defined as including a "musical arrangement" and "sound recording," but also "*any other form in which a work may be recast, transformed, or adapted*." That is a lot broader than just arrangements and adaptations, and it is not clear whether the right to exclude is limited to the kinds of traditional markets we have discussed so far.

Importantly, as we will see, this right, along with the other exclusive rights, is limited by the "fair use" exception, which allows creative reuse under some circumstances. Copyright law also includes special rules for the internet including a law called the Digital Millennium Copyright Act. Under this law, if you post a song to a platform such as YouTube without permission, and the copyright owner objects, YouTube must take down your video "expeditiously," generally within 48 hours. If they do so, the law gives them a "safe harbor." *You* may technically be infringing copyright. They are not. More on that subject later.

So that's how the exclusive rights have expanded over the years. Good news: if you have a copyright, you—or the person you assign your rights to—may be able to control these uses and demand payment for them. If you are the one using the copyrighted material, you need to pay, or seek permission for many of these uses. This seems both fair and good. We

want creators to get paid—that was the idea behind the system in the first place. Yet, as we will see, the expanding universe of rights can create problems for those who are trying to create new, legal distribution mechanisms or simply trying to exercise the freedoms the system customarily gave the public. The exclusive rights have "accreted" in sedimentary layers as technology and business have changed over time. If we were starting with a blank slate today, with the same goals of promoting progress and remunerating creators and distributors, we would probably design a different system.

2.8 THE COPYRIGHT TERM

One of the most dramatic changes in copyright law has been the length of the copyright term. In 1790, it was 14 years from publication, with the option to renew for another 14, if the author was still living. In 1831: 28 years from publication, with the option to renew for 14. In 1909: 28 years from publication, plus an optional 28-year renewal term, for a total of 56 years. Then in 1976, the term was extended to a single term of life plus 50 years, or 75 years after publication for corporate works. Finally, in 1998, the term went to life of the author plus *70 years*, and *95 years from publication* for works of corporate authorship. For eligible works published before 1978, the law retroactively extended their term to 95 years after publication. Figure 2.2 illustrates how the copyright term has expanded.

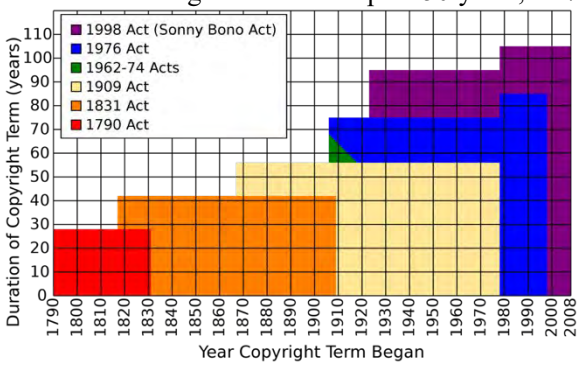


Chart by Tom Bell (Figure 2.2)

Now, anything you write will be copyrighted until 70 years after you "shuffle off this mortal coil." That's from Shakespeare, and not copyrighted! While this long period of copyright might sound great for your grandchildren and great grandchildren, in reality they are unlikely to see any proceeds from your talents because few works make money for that long. A Congressional study found that only *2 percent* of works between 55 and 75 years old continue to retain commercial value. After that, the number is even lower. So toward the end of the copyright term, all of those creative works are in limbo—no one is benefiting from continued copyright protection, but they are nevertheless off limits to everyone else. It is presumptively illegal to republish, adapt, digitize, or make other uses of them that would implicate the exclusive rights we just discussed. As a result, the longer copyright term often impedes the "progress" that copyright is intended to promote.

2.9 COPYRIGHT'S PRACTICAL REACH

The final change worth mentioning is a practical rather than legal one. Technology has changed copyright's potential reach. As mentioned earlier, copyright is now implicated by a wide range of routine activities because we all create copies constantly—they are bound up with the kinds of listening, browsing, and sharing that, in the past, did not trigger exclusive

rights. Reading a paperback does not require the creation of a copy. Reading the same book on a computer screen does. Copyright also reaches a wider range of *creative* activity, because digital technology has changed the way we create. A few decades ago, if you wanted to write a song you might sit down at the piano, or get your band together in the basement or garage, or hole up in the corner of your dorm room with a guitar. You couldn't click and drag any number of files into music software on your computer or phone and edit their pitch and tempo, apply filters, transform them, stack them, and mash them up. Now, remix artists like Barry are making music that copies *lots* of other works. Is Barry infringing copyright? The law does not have a settled answer to this question; we will discuss this further in Chapter Nine.

2.10 A MUSIC COPYRIGHT TIMELINE

Here is a larger timeline previewing some important milestones in the development of music copyright law in blue, alongside technological changes in purple (Figures 2.3–2.7). We will cover many of the specifics in upcoming chapters, and you can refer back to this chronology as you read. It is not meant to be a comprehensive timeline, of course, but it does provide some illustrative highlights.

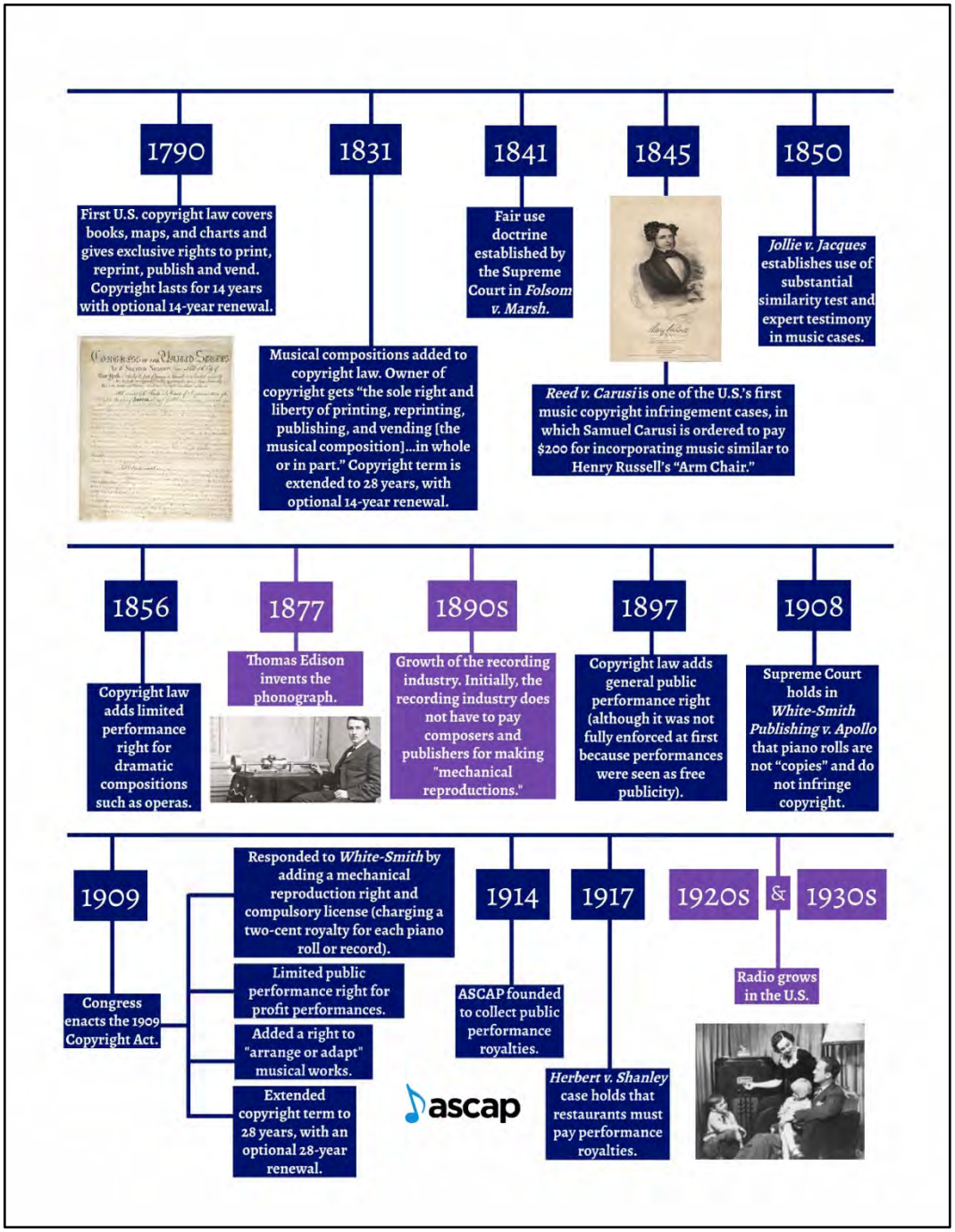

1790
First U.S. copyright law covers books, maps, and charts and gives exclusive rights to print, reprint, publish and vend. Copyright lasts for 14 years with optional 14-year renewal.
1831
Musical compositions added to copyright law. Owner of copyright gets "the sole right and liberty of printing, reprinting, publishing, and vending [the musical composition]...in whole or in part." Copyright term is extended to 28 years, with optional 14-year renewal.
1841
Fair use doctrine established by the Supreme Court in Folsom v. Marsh.
1845
Reed v. Carusi is one of the U.S.'s first music copyright infringement cases, in which Samuel Carusi is ordered to pay $200 for incorporating music similar to Henry Russell's "Arm Chair."
1850
Jollie v. Jacques establishes use of substantial similarity test and expert testimony in music cases.
1856
Copyright law adds limited performance right for dramatic compositions such as operas.
1877
Thomas Edison invents the phonograph.
1890s
Growth of the recording industry. Initially, the recording industry does not have to pay composers and publishers for making "mechanical reproductions."
1897
Copyright law adds general public performance right (although it was not fully enforced at first because performances were seen as free publicity).
1908
Supreme Court holds in White-Smith Publishing v. Apollo that piano rolls are not "copies" and do not infringe copyright.
1909
Congress enacts the 1909 Copyright Act.
Responded to White-Smith by adding a mechanical reproduction right and compulsory license (charging a two-cent royalty for each piano roll or record).
Limited public performance right for profit performances.
Added a right to "arrange or adapt" musical works.
Extended copyright term to 28 years, with an optional 28-year renewal.
1914
ASCAP founded to collect public performance royalties.
ascap
1917
Herbert v. Shanley case holds that restaurants must pay performance royalties.
1920s & 1930s
Radio grows in the U.S.

Figure 2.3

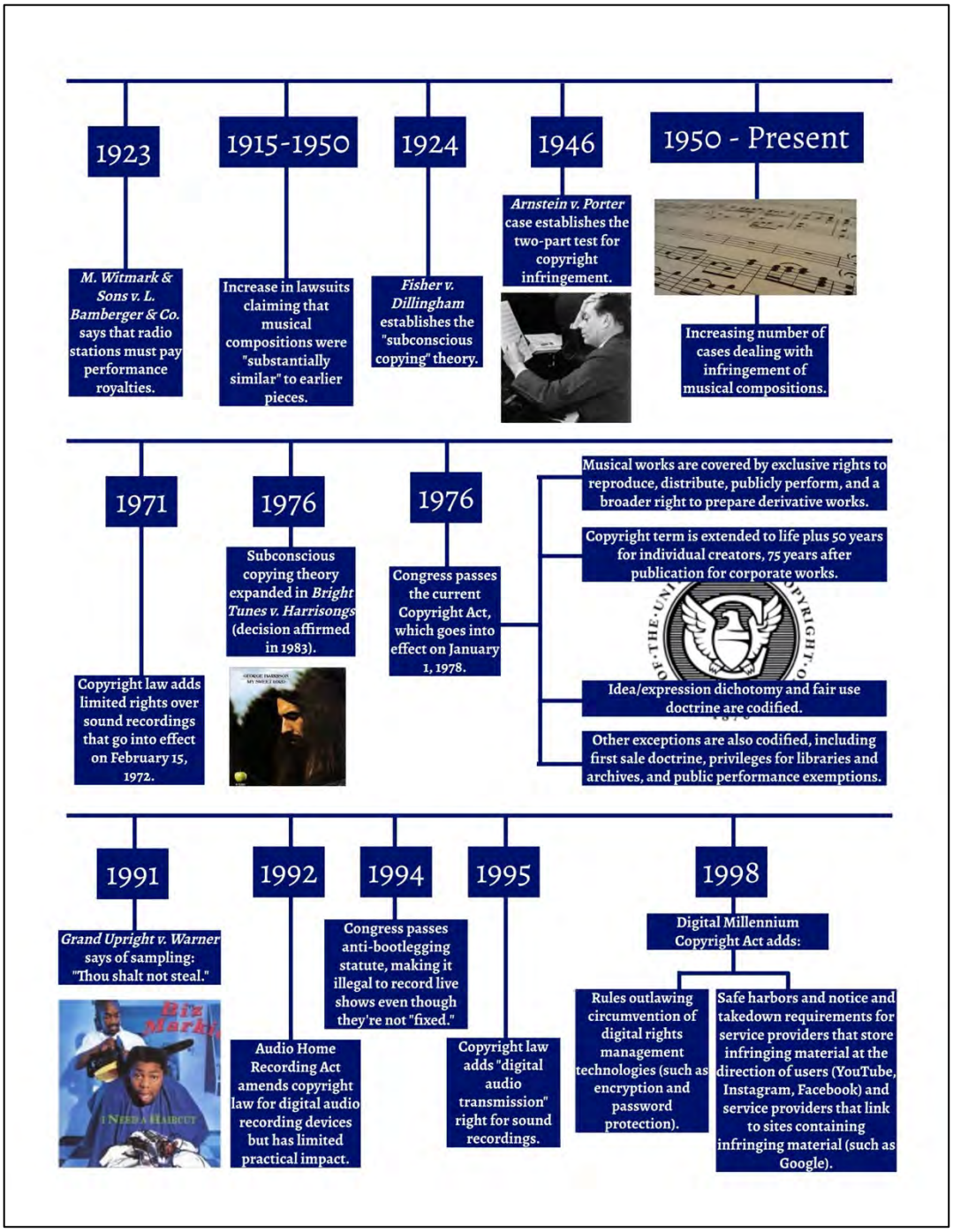

1923
M. Witmark & Sons v. L. Bamberger & Co. says that radio stations must pay performance royalties.
1915-1950
Increase in lawsuits claiming that musical compositions were "substantially similar" to earlier pieces.
1924
Fisher v. Dillingham establishes the "subconscious copying" theory.
1946
Arnstein v. Porter case establishes the two-part test for copyright infringement.
1950 - Present
Increasing number of cases dealing with infringement of musical compositions.
1971
Copyright law adds limited rights over sound recordings that go into effect on February 15, 1972.
1976
Subconscious copying theory expanded in Bright Tunes v. Harrisongs (decision affirmed in 1983).
1976
Congress passes the current Copyright Act, which goes into effect on January 1, 1978.
Musical works are covered by exclusive rights to reproduce, distribute, publicly perform, and a broader right to prepare derivative works.
Copyright term is extended to life plus 50 years for individual creators, 75 years after publication for corporate works.
Idea/expression dichotomy and fair use doctrine are codified.
Other exceptions are also codified, including first sale doctrine, privileges for libraries and archives, and public performance exemptions.
1991
Grand Upright v. Warner says of sampling: "Thou shalt not steal."
1992
Audio Home Recording Act amends copyright law for digital audio recording devices but has limited practical impact.
1994
Congress passes anti-bootlegging statute, making it illegal to record live shows even though they're not "fixed."
1995
Copyright law adds "digital audio transmission" right for sound recordings.
1998
Digital Millennium Copyright Act adds:
Rules outlawing circumvention of digital rights management technologies (such as encryption and password protection).
Safe harbors and notice and takedown requirements for service providers that store infringing material at the direction of users (YouTube, Instagram, Facebook) and service providers that link to sites containing infringing material (such as Google).

Figure 2.4

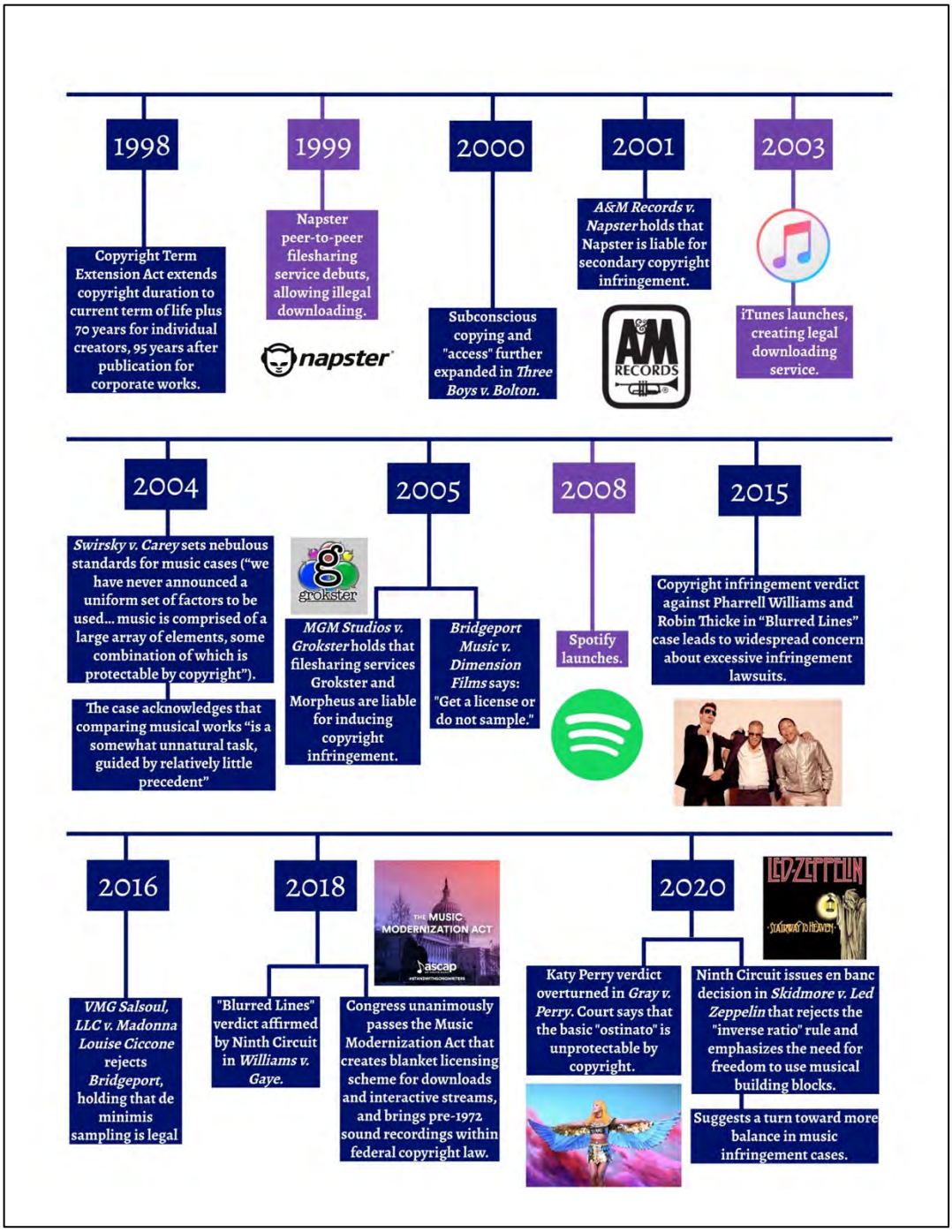

1998
Copyright Term Extension Act extends copyright duration to current term of life plus 70 years for individual creators, 95 years after publication for corporate works.
1999
Napster peer-to-peer filesharing service debuts, allowing illegal downloading.
napster
2000
Subconscious copying and "access" further expanded in Three Boys v. Bolton.
2001
A&M Records v. Napster holds that Napster is liable for secondary copyright infringement.
A&M RECORDS
2003
iTunes launches, creating legal downloading service.
2004
Swirsky v. Carey sets nebulous standards for music cases ("we have never announced a uniform set of factors to be used... music is comprised of a large array of elements, some combination of which is protectable by copyright").
The case acknowledges that comparing musical works "is a somewhat unnatural task, guided by relatively little precedent"
2005
grokster
MGM Studios v. Grokster holds that filesharing services Grokster and Morpheus are liable for inducing copyright infringement.
Bridgeport Music v. Dimension Films says: "Get a license or do not sample."
2008
Spotify launches.
2015
Copyright infringement verdict against Pharrell Williams and Robin Thicke in "Blurred Lines" case leads to widespread concern about excessive infringement lawsuits.
2016
VMG Salsoul, LLC v. Madonna Louise Ciccone rejects Bridgeport, holding that de minimis sampling is legal
2018
"Blurred Lines" verdict affirmed by Ninth Circuit in Williams v. Gaye.
THE MUSIC MODERNIZATION ACT
ascap
Congress unanimously passes the Music Modernization Act that creates blanket licensing scheme for downloads and interactive streams, and brings pre-1972 sound recordings within federal copyright law.
2020
Katy Perry verdict overturned in Gray v. Perry. Court says that the basic "ostinato" is unprotectable by copyright.
LED ZEPPELIN
Ninth Circuit issues en banc decision in Skidmore v. Led Zeppelin that rejects the "inverse ratio" rule and emphasizes the need for freedom to use musical building blocks.
Suggests a turn toward more balance in music infringement cases.

Figure 2.5

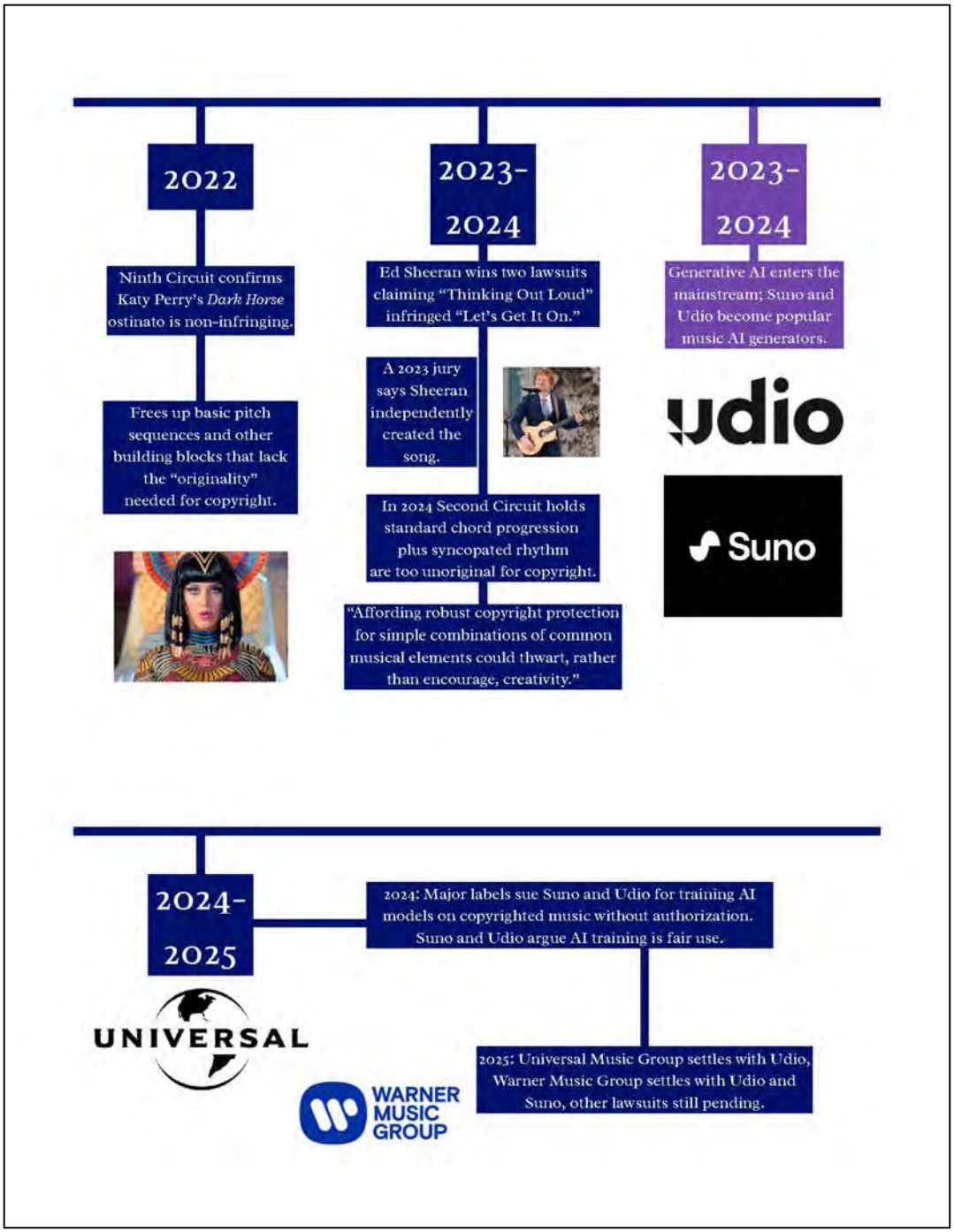

2022
Ninth Circuit confirms Katy Perry's *Dark Horse* ostinato is non-infringing.
Frees up basic pitch sequences and other building blocks that lack the "originality" needed for copyright.
2023–2024
Ed Sheeran wins two lawsuits claiming "Thinking Out Loud" infringed "Let's Get It On."
A 2023 jury says Sheeran independently created the song.
In 2024 Second Circuit holds standard chord progression plus syncopated rhythm are too unoriginal for copyright.
"Affording robust copyright protection for simple combinations of common musical elements could thwart, rather than encourage, creativity."
2023–2024
Generative AI enters the mainstream; Suno and Udio become popular music AI generators.
udio
Suno
2024–2025
2024: Major labels sue Suno and Udio for training AI models on copyrighted music without authorization. Suno and Udio argue AI training is fair use.
UNIVERSAL
WARNER MUSIC GROUP
2025: Universal Music Group settles with Udio, Warner Music Group settles with Udio and Suno, other lawsuits still pending.

Figure 2.6

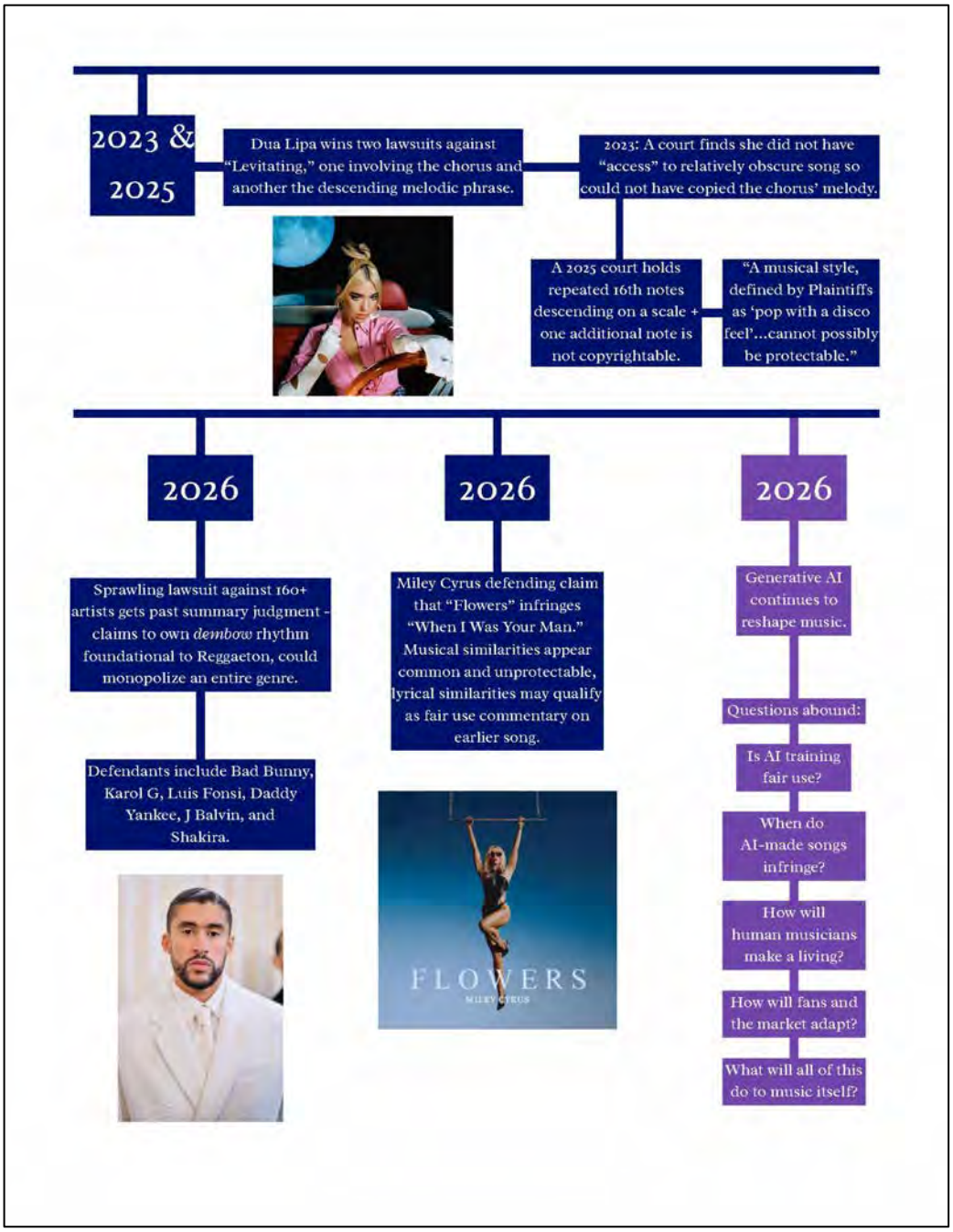

2023 & 2025
Dua Lipa wins two lawsuits against "Levitating," one involving the chorus and another the descending melodic phrase.
2023: A court finds she did not have "access" to relatively obscure song so could not have copied the chorus' melody.
A 2025 court holds repeated 16th notes descending on a scale + one additional note is not copyrightable.
"A musical style, defined by Plaintiffs as 'pop with a disco feel'...cannot possibly be protectable."
2026
Sprawling lawsuit against 160+ artists gets past summary judgment - claims to own dembow rhythm foundational to Reggaeton, could monopolize an entire genre.
Defendants include Bad Bunny, Karol G, Luis Fonsi, Daddy Yankee, J Balvin, and Shakira.
2026
Miley Cyrus defending claim that "Flowers" infringes "When I Was Your Man." Musical similarities appear common and unprotectable, lyrical similarities may qualify as fair use commentary on earlier song.
FLOWERS
MILEY CYRUS
2026
Generative AI continues to reshape music.
Questions abound:
Is AI training fair use?
When do AI-made songs infringe?
How will human musicians make a living?
How will fans and the market adapt?
What will all of this do to music itself?

Figure 2.7

SUMMARY

We began this chapter with the question of "Why." Copyright's purpose is to "promote the progress"—to encourage creativity and innovation, in order to benefit the public. While this objective has been with us since the Constitution was written, trying to achieve that goal has been altogether more complex. What is the right balance of control and freedom? How do we craft rules that nurture the Anitas, Barrys, and Calandras of this world?

Copyright's rules determine how music gets made, how artists get paid, and how we as a culture get the music we enjoy. These rules *matter*. This chapter has told you about the history of these rules, and how copyright has expanded in scope, length, and practical effect over time. We will refer back to these and other developments in subsequent chapters, where we will get to consider the other questions posed in the Introduction: "Did we make the right decisions?" and "Are we still making them?"

Chapter Three will dig deeper into the dialectic between law, technology, and music explored in Chapter One by focusing on two revolutionary technologies—sound recording and radio—and the changes that occurred in their wake.

3

A Tale of Two Technologies

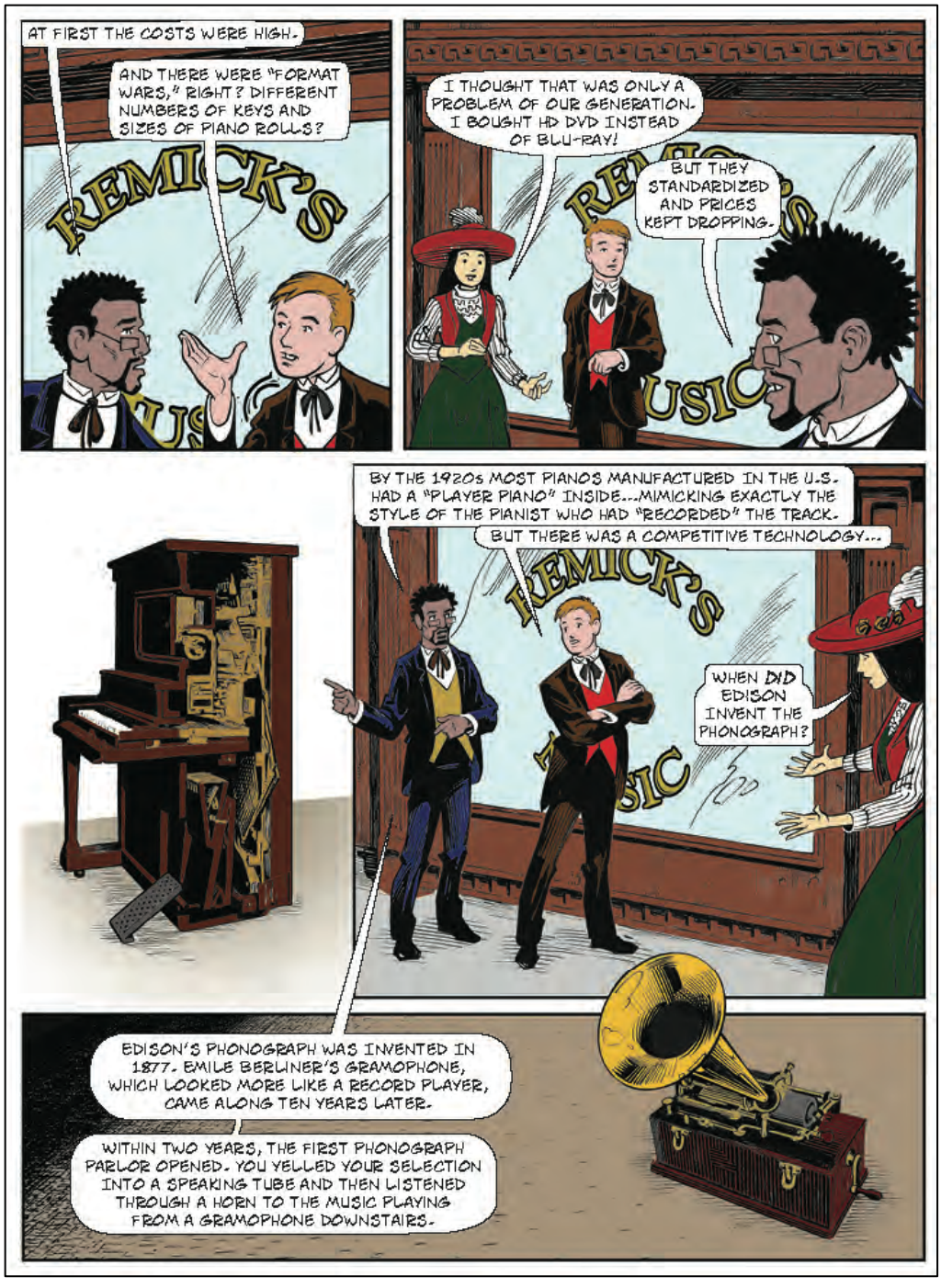
Inside This Chapter

3.1 "A MARVELOUS CHANGE" 57
3.2 THE COMPULSORY LICENSE FOR RECORDINGS.....65
3.3 SEPARATE COPYRIGHTS OVER RECORDINGS.....68
3.4 RADIO GA GA 73
3.5 THE "BLANKET" LICENSE FOR PERFORMANCES.....78

Chapter One showed how law and technology developed on parallel timelines that influenced each other but were not always in sync. This chapter will home in on that theme and tell the stories of two revolutionary technologies for music: sound recordings and radio. Each of these transformed how we experience music, spawned new industries, and led to a series of legal changes that endure today. In the previous chapter, you learned about the exclusive rights over musical compositions; this chapter will add two special ways of licensing some of those rights, as well as a whole new right over sound recordings that went into effect in 1972. When we turn to music streaming in Chapter Twelve, we will see how these transformations continue to inform today's legal landscape.

3.1 "A MARVELOUS CHANGE"

Our journey under the sea in Chapter Two concluded around the turn of the 20th century. At that time, another enormous transformation was afoot. Sound recording technologies had just been invented. It may surprise you to think about a time—not that long ago—when, to hear a song, you needed a human being to play it for you. There were no recordings and no machines to play them on. Recording technology changed that and eventually gave us two different sets of rights: one for songwriters or composers and another for artists who record one of their compositions. Here are the comic book characters discussing some of the early technological breakthroughs.

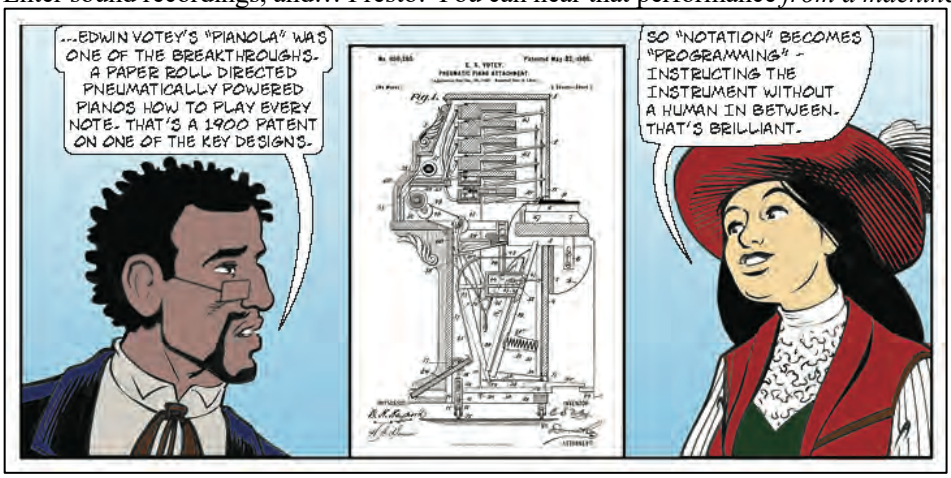

AT FIRST THE COSTS WERE HIGH.
AND THERE WERE "FORMAT WARS," RIGHT? DIFFERENT NUMBERS OF KEYS AND SIZES OF PIANO ROLLS?
I THOUGHT THAT WAS ONLY A PROBLEM OF OUR GENERATION. I BOUGHT HD DVD INSTEAD OF BLU-RAY!
BUT THEY STANDARDIZED AND PRICES KEPT DROPPING.
BY THE 1920s MOST PIANOS MANUFACTURED IN THE U.S. HAD A "PLAYER PIANO" INSIDE...MIMICKING EXACTLY THE STYLE OF THE PIANIST WHO HAD "RECORDED" THE TRACK.
BUT THERE WAS A COMPETITIVE TECHNOLOGY...
WHEN DID EDISON INVENT THE PHONOGRAPH?
EDISON'S PHONOGRAPH WAS INVENTED IN 1877. EMILE BERLINER'S GRAMOPHONE, WHICH LOOKED MORE LIKE A RECORD PLAYER, CAME ALONG TEN YEARS LATER.
WITHIN TWO YEARS, THE FIRST PHONOGRAPH PARLOR OPENED. YOU YELLED YOUR SELECTION INTO A SPEAKING TUBE AND THEN LISTENED THROUGH A HORN TO THE MUSIC PLAYING FROM A GRAMOPHONE DOWNSTAIRS.

IN 1901 BERLINER JOINED FORCES WITH E.R. JOHNSON, WHO HAD SOLVED THE PROBLEM OF THE GRAMOPHONE'S MOTOR, DOING BUSINESS AS THE VICTOR TALKING MACHINE COMPANY. YOU MAY RECOGNIZE THE TRADEMARK...
GADZOOKS! THIS DEVICE WILL UNSETTLE THE POLITICAL ECONOMY OF MUSIC MAKING...! ALSO, I THINK THE TECHNICIAN DROPPED SOME BACON DOWN THAT HORN...
THE RECORDING INDUSTRY EXPANDED FAST. THE OPERA SINGER ENRICO CARUSO MADE HIS FIRST RECORDING IN 1902...
THAT EARLY!
E. BERLINER
GRAMOPHONE
No. 372,786
Patented Nov. 8, 1887.

Let's take a step back to appreciate just how momentous this technology was. Before there were sound recordings, if Anita wrote a song and you wanted to hear it, you would need to play it yourself, or get someone to sing it for you (preferably Calandra). If you wanted to hear the full song, you would also need a band, with all of their instruments—drums, bass, keyboard, horns, guitar, violin, marimba; as mentioned earlier, her music is densely packed. If you wanted to hear a Beethoven symphony, you would need enough money to go to a symphony hall. If you wanted to hear Billie Holiday or Ella Fitzgerald or Louis Armstrong,

you would need to see them in person. (Lucky, lucky you.) To hear music, you needed a human intermediary.

Enter sound recordings, and… Presto! You can hear that performance *from a machine*!


...EDWIN VOTEY'S "PIANOLA" WAS ONE OF THE BREAKTHROUGHS- A PAPER ROLL DIRECTED PNEUMATICALLY POWERED PIANOS HOW TO PLAY EVERY NOTE- THAT'S A 1900 PATENT ON ONE OF THE KEY DESIGNS-
SO "NOTATION" BECOMES "PROGRAMMING" - INSTRUCTING THE INSTRUMENT WITHOUT A HUMAN IN BETWEEN- THAT'S BRILLIANT-

As explained in the comic, *notation*—those scores you saw in Chapter One—becomes *programming*, "instructing the instrument without a human in between." Talk about a transformation. It spawns an entirely new *market* (for recorded music), provided by a new *industry* (the recording industry), created by a new class of *artists* (recording artists). It ushers in a different kind of *consumer*. People no longer have to sing the music themselves, buy sheet music to play on their pianos, or pay for the live performance. For the first time, they can listen to music in *private*, with access to a dramatically expanded variety of music and high-quality performances. Music goes from being *active and participatory* to *passive and consumptive*. To appeal to these new consumers, music will begin to *sound* different. And, of course, this technology led to changes in the *law.*

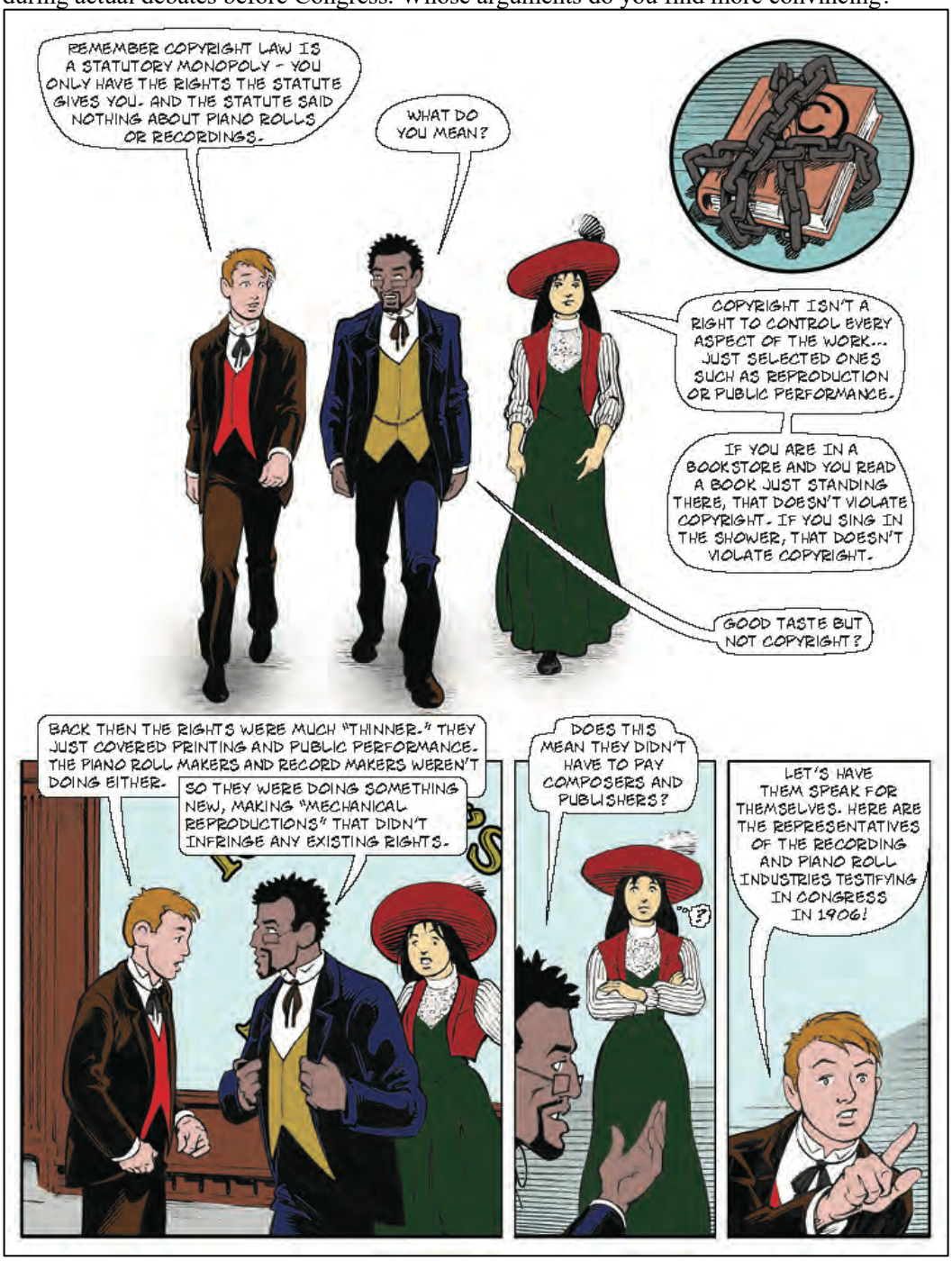
Not everyone was thrilled with this transition. Here is the composer John Phillip Sousa warning of the deleterious effects of these newfangled "talking machines":

> "These talking machines are going to ruin the artistic development of music in this country. When I was a boy… in front of every house in the summer evenings, you would find young people together singing the songs of the day or old songs. Today you hear these infernal machines going night and day. We will not have a vocal cord left."

What do you think of his concerns? We have the benefit of hindsight, of course.

When sound recordings came along, copyright only covered the *printing* and *public performance* of musical compositions. It did not say anything about whether you had to get permission to make what is known as a "mechanical reproduction" of the music by putting it on a player piano roll, or a disc or cylinder for phonographs or gramophones. The only reproductions it dealt with were in paper form: notation on sheet music. The people who owned copyrights in that music—composers and publishers—asked Congress to give them a new right over these mechanical reproductions, so that anyone wanting to make and sell

recordings would have to make a deal with the copyright holders first. No deal, no sound recording. The nascent recording industry did not think it had to get the copyright owners' permission, or even to pay for the compositions. After all, they were the ones who had invented this technological marvel. The following excerpt includes quotes from both sides during actual debates before Congress. Whose arguments do you find more convincing?


REMEMBER COPYRIGHT LAW IS A STATUTORY MONOPOLY - YOU ONLY HAVE THE RIGHTS THE STATUTE GIVES YOU. AND THE STATUTE SAID NOTHING ABOUT PIANO ROLLS OR RECORDINGS.
WHAT DO YOU MEAN?
COPYRIGHT ISN'T A RIGHT TO CONTROL EVERY ASPECT OF THE WORK... JUST SELECTED ONES SUCH AS REPRODUCTION OR PUBLIC PERFORMANCE.
IF YOU ARE IN A BOOKSTORE AND YOU READ A BOOK JUST STANDING THERE, THAT DOESN'T VIOLATE COPYRIGHT. IF YOU SING IN THE SHOWER, THAT DOESN'T VIOLATE COPYRIGHT.
GOOD TASTE BUT NOT COPYRIGHT?
BACK THEN THE RIGHTS WERE MUCH "THINNER." THEY JUST COVERED PRINTING AND PUBLIC PERFORMANCE. THE PIANO ROLL MAKERS AND RECORD MAKERS WEREN'T DOING EITHER.
SO THEY WERE DOING SOMETHING NEW, MAKING "MECHANICAL REPRODUCTIONS" THAT DIDN'T INFRINGE ANY EXISTING RIGHTS.
DOES THIS MEAN THEY DIDN'T HAVE TO PAY COMPOSERS AND PUBLISHERS?
LET'S HAVE THEM SPEAK FOR THEMSELVES. HERE ARE THE REPRESENTATIVES OF THE RECORDING AND PIANO ROLL INDUSTRIES TESTIFYING IN CONGRESS IN 1906!

"ALL TALK ABOUT 'DISHONESTY' AND 'THEFT' IN THIS CONNECTION, FROM HOWEVER HIGH A SOURCE, IS THE MEREST CLAPTRAP, FOR THERE EXISTS NO PROPERTY IN IDEAS, MUSICAL, LITERARY OR ARTISTIC, EXCEPT AS DEFINED BY STATUTE."
PHILIP MAURO
AMERICAN GRAPHOPHONE COMPA
"IT IS THEREFORE PERFECTLY DEMONSTRABLE THAT THE INTRODUCTION OF AUTOMATIC MUSIC PLAYERS HAS NOT DEPRIVED ANY COMPOSER OF ANYTHING HE HAD BEFORE THEIR INTRODUCTION."
"WE HAVE A RIGHT UNDER THE LAW OF THE LAND AS IT STANDS TODAY TO REPRODUCE...MUSIC: PAST, PRESENT OR FUTURE. THIS BILL SAYS TO US THAT WE CANNOT REPRODUCE THAT IF SOME FELLOW TELLS US WE CANNOT."
"THE COMPOSERS AND THE PUBLIC ALIKE WERE DEPENDENT A FEW YEARS AGO FOR THE RENDITION OF THESE COMPOSITIONS... ENTIRELY UPON THE HUMAN VOICE OR UPON INSTRUMENTS MANIPULATED BY HUMAN FINGERS. HENCE THERE WAS A VERY NARROW LIMIT TO THE AUDIBLE RENDITION OF MUSICAL COMPOSITIONS, AND THE AVERAGE QUALITY THEREOF WAS VERY LOW, BEING DETERMINED BY THE SKILL OF THE HUMAN PERFORMER...IN A FEW YEARS THE GENIUS OF THE INVENTOR HAS BROUGHT ABOUT A MARVELOUS CHANGE...THE COMPOSERS AND PUBLISHERS HAVE NOT CONTRIBUTED IN THE SLIGHTEST DEGREE TO THIS CHANGE...YET THE PUBLISHER DOES NOT SCRUPLE TO DEMAND RADICAL CHANGE OF LEGISLATION IN ORDER TO GIVE HIM THE ENTIRE MONOPOLY OF THE BENEFITS...AND HAS THE EFFRONTERY TO APPLY VITUPERATIVE EPITHETS TO THOSE WHO VENTURE TO OPPOSE HIS SCHEME OF GREED."
ALBERT WALKER
AUTO-MUSIC PERFORATING COMPANY OF NEW YORK
GEORGE POUND
DEKLEIST MUSICAL INSTRUMENT MANUFACTURING COMPANY & RUDOLPH WURLITZER COMPANY

SO THE RECORDING INDUSTRY BACK THEN WANTED NEW TECHNOLOGIES TO HAVE THE FREEDOM TO COPY? IRONY! AND THEY WERE INDIGNANT ABOUT THE SUGGESTION THEY SHOULD HAVE TO PAY COMPOSERS FOR RECORDING THEIR SONGS?
ABSOLUTELY. THEY THOUGHT THAT THEIR TECHNOLOGY HAD CREATED A NEW MARKET AND CLAIMED IT WOULD BE BETTER FOR THE PUBLIC IF RECORDINGS WERE FREELY MADE. JOHN PHILIP SOUSA DIDN'T AGREE.
"THESE PERFORATED ROLL COMPANIES AND THESE PHONOGRAPH COMPANIES TAKE MY PROPERTY AND PUT IT ON THEIR RECORDS...WHEN THEY MAKE MONEY OUT OF MY PIECES, I WANT A SHARE OF IT...THEY HAVE TO BUY THE WOOD THAT THEY MAKE THE BOX OUT OF, AND THE MATERIAL FOR THE DISK, AND THAT DISK AS IT STANDS, WITHOUT THE COMPOSITION OF AN AMERICAN COMPOSER ON IT, IS NOT WORTH A PENNY. PUT THE COMPOSITION OF AN AMERICAN COMPOSER ON IT AND IT IS WORTH $1.50. WHAT MAKES THE DIFFERENCE? THE STUFF THAT WE WRITE."
YEAH! THAT'S WHAT I'M TALKING ABOUT! SOMEONE NEEDS TO STAND UP FOR THE COMPOSER. MAN, THAT GUY TALKED JUST LIKE HE COMPOSED. MAKES YOU WANT TO GET UP AND MARCH!
HMMPH. I THINK THE RECORDING INDUSTRY GUYS HAD A POINT. THEY WERE WORRIED THAT THE PUBLISHERS HAD FORMED A CARTEL TO MONOPOLIZE MUSIC.
MAYBE YOU DISAGREE WITH SOUSA BECAUSE NO ONE WOULD EVER WANT TO COPY ANYTHING YOU WROTE?

ANYWAY, SOUSA WON THE DAY, RIGHT? THE 1909 COPYRIGHT ACT DID CREATE A NEW COMPOSER'S RIGHT OVER PIANO ROLLS AND OTHER SOUND RECORDINGS.
YES, BUT THE RECORDING INDUSTRIES GOT SOMETHING TOO. ONCE A COMPOSER ALLOWED RECORDING OF A SONG, ANYONE COULD RECORD IT PROVIDED THEY PAID A STANDARD FEE. IT'S CALLED A "COMPULSORY LICENSE." WE'VE STILL GOT IT TODAY. IT'S THE LICENSE THAT ALLOWS PEOPLE TO MAKE COVER VERSIONS FOR A FLAT FEE.
A PEACE TREATY FOR THE MUSIC WARS!! IT DESERVES ITS OWN SONG!
"YOU SAY HYPOCRITICAL, I SAY PIRATICAL... YOU SAY PRO-TECHNICAL, I SAY HERETICAL... 'POCRITICAL, PIRATICAL, PRO-TECHNICAL, HERETICAL... LICENSE THE WHOLE THING OFF!"

Notice the composers' arguments. John Philip Sousa, just quoted above, was vocal in these debates. Sousa was famous for composing marches, including the one that was the theme music for the Monty Python's Flying Circus TV show; if you were in a marching band, you may have played one of his pieces. He pointed out that those early recordings—perforated rolls, discs—were worthless until they had the work of composers like him on them. It was his music that made the difference. Why shouldn't he share in this new market?

Now notice some of the arguments made by the representatives of the nascent recording industry—the companies that made gramophones, player pianos, perforated piano rolls. They countered that they were not taking anything away from composers, who still had the same rights over printing and performance they had before. It was the *recording industry's* innovation that had brought about this "marvelous change," which benefited the public and composers alike. Elsewhere during these debates, the recording industry representatives added that their products were even benefitting composers financially, by providing free publicity that drove sheet music sales. Albert Walker of the Auto-Music Perforating Company of New York said:

> The introduction of automatic music players has much increased the composer's revenues from the sales of sheet music. Why so? Because the composers' tunes have been advertised far more extensively by the automatic music instruments than they could have been advertised in any other way, and those instruments have drawn to the sheet music an enormously increased demand. . . . [T]he statistics show that the greatest benefit conferred upon composers in this country in the last ten years has been conferred upon them by the very people they denounce as pirates.

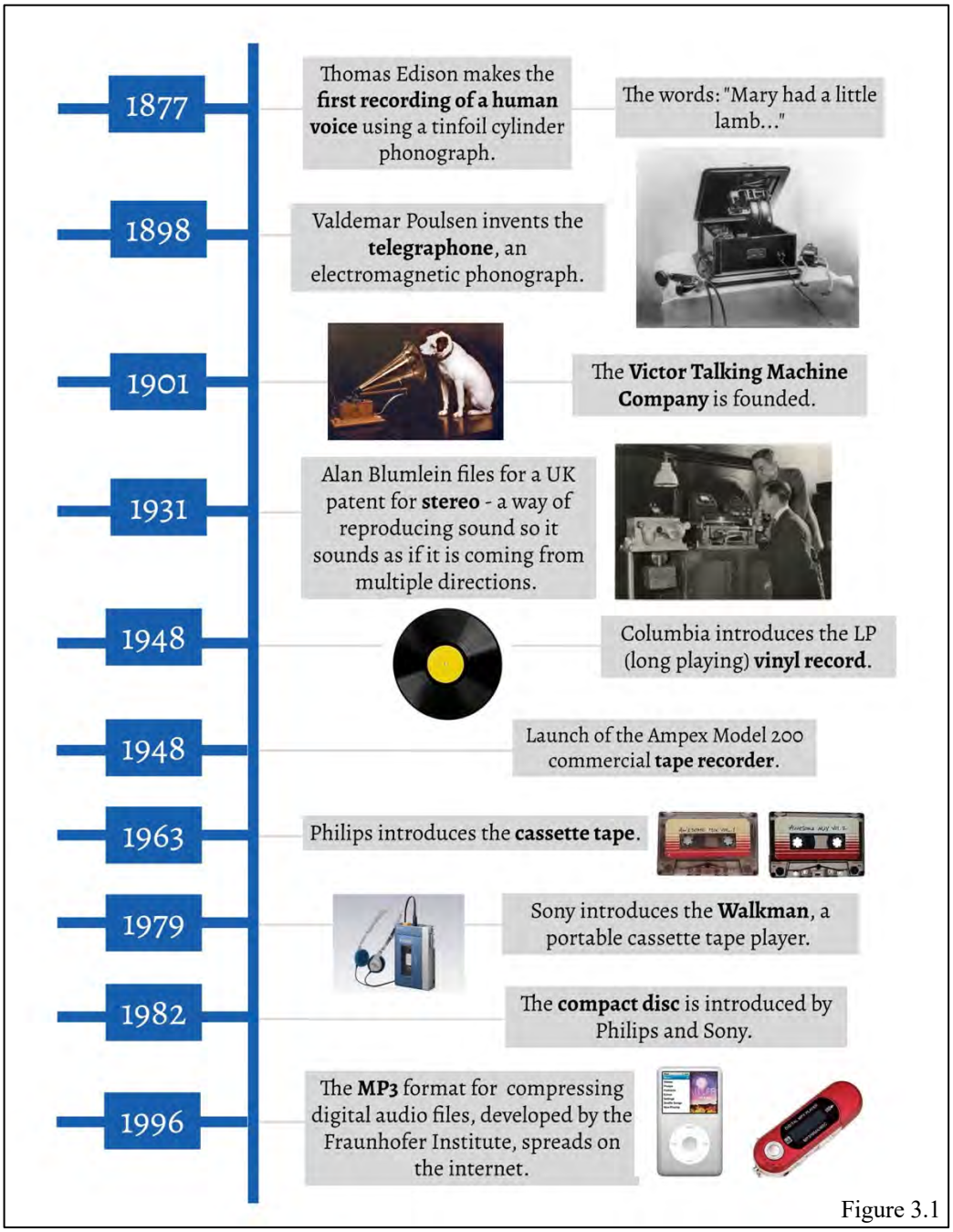
3.2 THE COMPULSORY LICENSE FOR RECORDINGS

Sound recording technologies led to a series of adjustments in copyright law, though not within the time frame you might expect. The first change was the compulsory license you just read about in the comic. In response to those spirited debates, Congress struck a compromise (!). Composers and publishers could get *paid* for recordings, but it was a flat fee; they did not get a new exclusive right that would have allowed them to say "no" or set the price. The recording companies could make those recordings, but not without paying something to the copyright holders. **This is called a "compulsory license," meaning that the license must be granted as long as certain criteria are met**—in this case, after the composer allowed the first recording of a song, anyone else could record it too, as long as they paid a standard fee.

By denying the composers a monopoly over mechanical reproductions, Congress also prevented the recording companies from obtaining a monopoly themselves. There was a lot of concern about monopolies at the time—the two foundational antitrust laws in the United States that prevent monopolies were passed in 1890 (the Sherman Act) and 1914 (the Clayton Act). You've probably heard concerns about the market power of Facebook/Meta or Amazon; back then the focus was on companies like Standard Oil, which the Supreme Court said was an illegal monopoly in 1911. In the music copyright world, the would-be monopolist was a player piano company called the Aeolian Company. While Congress was deciding what to do with mechanical reproductions, Aeolian had gone out and asked composers and publishers to agree that, if they got an exclusive right from Congress, they would only work with Aeolian. That way, Aeolian would be the only company who could record their compositions, keeping competitors out of the market. Seeing the danger of such

anticompetitive practices, Congress enacted the compulsory license—composers got paid, but Aeolian did not get its monopoly.

With the legal framework in place for making recordings, the recording industry grew, although not without some early hiccups. After selling 125 million units in 1926, sales plummeted to 6 million units in 1932 as a result of the Great Depression and competition from radio. They then rebounded to 130 million units by 1941 and over 375 million units in 1947 after World War II was over. As you can see on the timeline in Figure 3.1, innovators were also hard at work developing new recording technologies, which offered music to consumers through a succession of different formats. The early wax cylinders and piano rolls gave way to vinyl LPs (“long play” records), cassettes, CDs, and eventually digital files such as MP3s.


1877
Thomas Edison makes the **first recording of a human voice** using a tinfoil cylinder phonograph.
The words: "Mary had a little lamb..."
1898
Valdemar Poulsen invents the **telegraphone**, an electromagnetic phonograph.
1901
The **Victor Talking Machine Company** is founded.
1931
Alan Blumlein files for a UK patent for **stereo** - a way of reproducing sound so it sounds as if it is coming from multiple directions.
1948
Columbia introduces the LP (long playing) **vinyl record**.
1948
Launch of the Ampex Model 200 commercial **tape recorder**.
1963
Philips introduces the **cassette tape**.
1979
Sony introduces the **Walkman**, a portable cassette tape player.
1982
The **compact disc** is introduced by Philips and Sony.
1996
The **MP3** format for compressing digital audio files, developed by the Fraunhofer Institute, spreads on the internet.
Figure 3.1

As Figure 3.1 illustrates, the kinds of mechanical reproductions covered by the compulsory license have come a long way since 1909, as music has migrated onto new audio formats. Now that many people no longer buy music on physical media, mechanical reproductions encompass things like downloads, the recording on a ringtone, and even the reproductions that are made in the course of on-demand streaming. Wait, you might be saying…*streaming*? Isn't that more like listening to the radio than selling a vinyl copy of an album? Here's what happened: because of how digital technology works, any streaming service has to make "copies" in order to stream music to you. Even though those copies are

in the background and you don't actually receive a copy in the way you would with a download or a vinyl record, the law classified them as mechanical reproductions, and thus requires the payment of a set fee. (This process is just one example of the way the law retrofits old rules to new technologies. More on this in Chapter Eleven.)

This compulsory license is still part of today's copyright law. It has been updated several times, of course, but it continues to provide the framework for how songwriters and publishers get paid when someone records their song. **It is also the provision that allows people to make cover songs by recording their own version of a composition, as long as they do not "change the basic melody or fundamental character of the work."** In 1927, a company called the Harry Fox Agency was set up to collect and distribute the license fees. It still administers certain mechanical royalties for major music publishers today.

However there is an important recent change to the compulsory license: over 100 years after the original version was enacted, a law from 2018 called the "Music Modernization Act" added new rules designed to streamline the collection of mechanical royalties for *downloads* and *on-demand streams*. This law created an entity called the "Mechanical Licensing Collective" (or "MLC") to collect those fees. The MLC began administering the new licenses in January 2021, so at the time of writing this book, it is too early to evaluate how well the new scheme will ultimately work.

If you follow the music industry, you will likely read a lot about "**mechanicals**." That is the term for the royalties that songwriters get when someone makes a "**mechanical reproduction**" of their song (in plain English, we might just call this a "recording"). The copyright statute has its own term for mechanical reproductions: it calls them "**phonorecords**." For downloads and streams, copyright law has yet another term: "**digital phonorecord deliveries**."

3.3 SEPARATE COPYRIGHTS OVER RECORDINGS

The 1909 compulsory license was only copyright's first response to sound recording technology. That license dealt with *making* the recordings—it provided a way to legally make mechanical reproductions of musical compositions and pay the people who owned the copyrights. This section will present a separate set of legal changes that dealt with rights over the recordings *themselves* once they were made. These rights are often indicated with a ℗ symbol ("P" was for "phonogram") rather than the © symbol for the copyrights over musical compositions that we have been talking about thus far. (Note that the Copyright Act refers to musical compositions as "musical works" but we will refer to them as "compositions" for clarity.) These two different copyrights are an important aspect of copyright law that will feature throughout this book, particularly when we get into later chapters. We will adopt the © and ℗ symbols to help keep them distinct. Here is a visualization of these rights and some related terminology that is used in the music business (Figure 3.2).

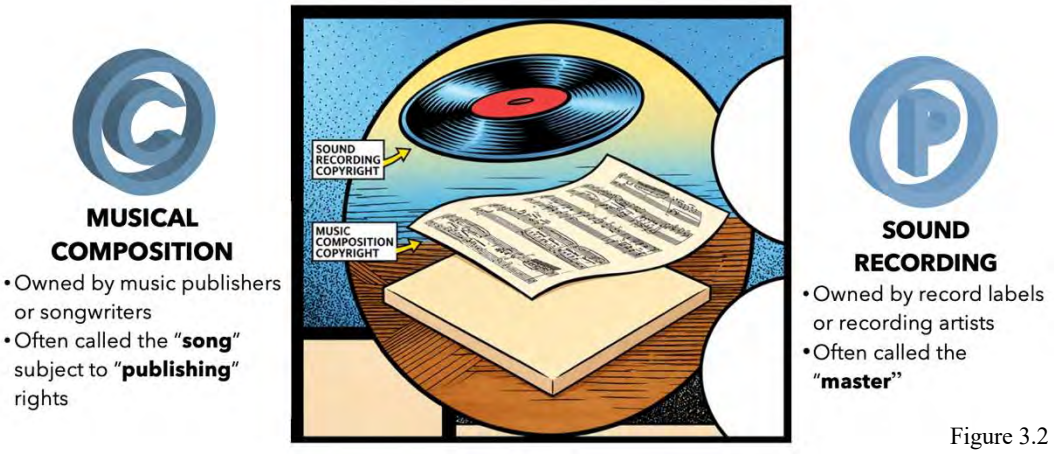

MUSICAL COMPOSITION
• Owned by music publishers or songwriters
• Often called the "song" subject to "publishing" rights
SOUND RECORDING COPYRIGHT
MUSIC COMPOSITION COPYRIGHT
SOUND RECORDING
• Owned by record labels or recording artists
• Often called the "master"

Figure 3.2

The ℗ right went into effect in 1972, with key amendments added in 1995 and 2018. Here is a brief timeline of what we are about to discuss (Figure 3.3). As you will see, the sound recording copyrights were prompted by technological and economic developments, and they in turn transformed the legal landscape.

The new ℗ right over sound recordings

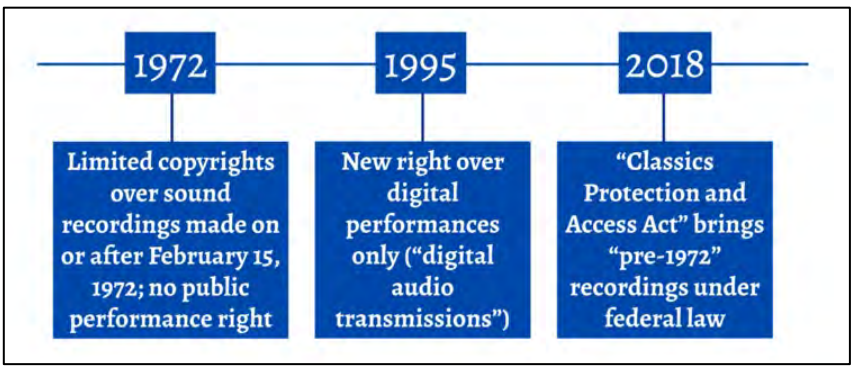

1972
Limited copyrights over sound recordings made on or after February 15, 1972; no public performance right
1995
New right over digital performances only ("digital audio transmissions")
2018
"Classics Protection and Access Act" brings "pre-1972" recordings under federal law

Figure 3.3

Let's start with the 1972 law. Historically, the *music* "fixed" on the earlier audio formats in the timeline in Figure 3.1 was owned by the composers who wrote it, or by their publishers. The performers who recorded that music, and their record labels, did not have a separate copyright over their recorded version of that music. If Calandra recorded Anita's song, it was Anita or her publisher who held the copyright over the track, not Calandra. Performers and labels made money from selling products that were more *rival* and *excludable*. (Remember the comparison between songs and beer in Chapter One? Their products were more like beer.) They

Tangible versus intangible property

Keep in mind that copyrights cover the *intangible* sounds that are "fixed" in the *tangible* medium of an audio format. If you buy a vinyl record, that physical object is yours to sell to a friend, to give away, to use as a frisbee or a placemat. The *copyrighted music* is the intangible intellectual creation that is pressed into the grooves of that record, or imprinted on magnetic tape, or encoded into a digital audio file.

sold records and tapes. They sold seats at live shows. But, unlike publishers, they were not selling rights to use the *music*, because they did not have them yet.

For decades, the recording industry had pushed for its own set of rights over recorded music, though it was not clear what shape those rights would take. If Anita already owned the *composition* embedded on the recording, then what aspects of that recording would Calandra or her record label own? What could they stop others from doing? The law would have to make sure that Anita's and Calandra's claims did not overlap, and that the new rights fit in with the rest of copyright law.

It was not until 1971 that Congress passed the "Sound Recording Amendment" that gave sound recordings special rights under federal copyright law. Before that, some individual *states* had laws that dealt with sound recordings, but there were no nationwide federal rights, and the breadth and validity of the state rights were unclear. The impetus for Congressional action was the *economic* strain from a rise in "record and tape piracy" that was driven in part by *technology* that made it easier to copy recordings. As explained by the US Copyright Office:

> Record and tape piracy had climbed to alarming proportions as the use of audiotapes and audiotape recorders became increasingly popular and made it easier to make and distribute unauthorized recordings on a commercial scale. The House Report accompanying the 1971 Act estimated the annual volume from pirated sales "in excess of $100 million" as compared with $300 million annually from legitimate sales of prerecorded tapes.

The 1971 amendment went into effect on **February 15, 1972**. That was an important date because all recordings made on or after that date got federal rights that made it illegal to copy and sell them without authorization. Recordings from before that date were not covered by federal law; instead, depending on the circumstances, they might have been subject to the various state laws.

Because the new federal law was drafted to address concerns about piracy, it targeted the copying and selling of unauthorized recordings. The rights over sound recordings were different and more limited than regular copyrights. They only prevented the unauthorized duplication of the "actual sounds" that constituted a *particular recording* of a composition, for example by repressing a record or dubbing a tape. Making an "independent" recording of a song, even if that recording managed to "imitate or simulate" the copyrighted sound recording, did not violate the new law. It was illegal to "cut and paste"; it was OK to echo. This is still true today. If Calandra records Anita's song, and someone copies *Calandra's* recording, then they would need Calandra's permission, or permission from her label, which often owns the rights. This is now called a "master-use license," and is paid to the ℗ owners for uses of recorded music—on streaming services, in samples, on TV shows and video games, etc. More on that in Chapter Eleven. But if someone records Anita's song themselves, and somehow perfectly mimics Calandra's voice, they do not need to pay Calandra or her label. In both cases, they would still need to pay Anita the compulsory license fee discussed earlier, because they would be making another "mechanical reproduction" of her composition.

Notably, the Ⓟ sound recording right does not include the general "public performance" right that composers and publishers have. With terrestrial radio broadcasts, this means that broadcasters only pay performance fees to the owners of the *composition* right. If Anita writes a song and Calandra records it, when that song gets played on the radio, Anita is the one who gets paid. Why was the public performance right omitted? Partly because of the context within which the law was enacted. As we have just discussed, the sound recording right was prompted by Congress's concern about "record and tape piracy," so they prohibited unauthorized copying and distribution of recordings, not performances of them. When the recording industry has pushed for performance rights over the years, the broadcasting industry has argued that adding this right would put smaller stations out of business, and that there is a symbiotic relationship between the broadcasting and recording industries, with radio play bolstering rather than supplanting record sales.

As mentioned earlier, these sound recording rights are still part of today's law. This means that **every piece of recorded music has two sets of rights attached to it—the ones over the *musical composition*, and the ones over the *sound recording***. As you will see, that can get… complicated.

The 1972 law was designed to curb piracy. But in doing so, it raised some enduring questions. To begin with, what is the nature of the **authorship** in the sound recording, as opposed to the authorship in the composition? By definition, the sound recording is derivative, because it is built on the composition. The performer is interpreting a preexisting song. Of course, often the songwriter and performer are the same person or group. But their © and Ⓟ rights still fall into two different buckets.

Sound recording rights raise other questions too. What happens when, instead of engaging in "piracy," someone makes a highly creative reuse of a sound recording, for example by **sampling** a few seconds of recorded sound in a new composition? In this case, they are not merely "imitating or simulating" the copyrighted sound recording; they are straight up copying it. Is this illegal? Not all courts agree on how the law should handle sampling; this is the subject of Chapter Nine.

Now let's go to 1995, when Congress updated the 1972 law in response to another new technology: the internet, and the markets it enabled. This update was called the "Digital Performance Right in Sound Recordings Act," and it gave sound recording copyright holders a new right over "**digital audio transmissions**." As mentioned, there is no general public performance right for sound recordings. When FM radio broadcasts Calandra's recording of Anita's song, or a DJ spins that song at a live show, Anita gets paid for the "public performance," but not Calandra. On the internet, things are different: performers like Calandra *do* get royalties for "digital audio transmissions," such as the ones made by subscription radio (SiriusXM, Pandora) and on-demand streaming services (Spotify, Apple Music). Part of the rationale was that, unlike a radio broadcast, digital transmissions—especially those that are available on demand—could serve as market substitutes for buying the recording. Like the 1972 law, this update both answered some questions and raised new ones. Now if you're that broadcaster or DJ, but you're on the internet, and want to use a

recording legally, you have to think about clearing rights to the digital audio transmissions, in addition to other rights. It is more complicated than you might think—we will discuss this in Chapter Eleven when we talk about music licensing.

Fast forward to 2018, when Congress made another significant change to sound recording copyright. Since 1972, it had been unclear how to deal with sound recordings from before February 15, 1972 which were still covered by a strange patchwork of state laws. As streaming services entered the picture, some of the owners of older recordings sued Pandora and SiriusXM under different states' laws for streaming those recordings without permission, leading to some bizarre court decisions and even more confusion. A flurry of activity in the Copyright Office and Congress ensued. Eventually, almost 50 years after the 1972 law, we got a fix—in October 2018, the "**Classics Protection and Access Act**" brought pre-1972 recordings under federal law. This new law was part of the larger "Music Modernization Act" mentioned earlier. "Classics" is an acronym for "Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society."

This means that recordings from before and after February 15, 1972 now have federal rights, and that they are also subject to federal exceptions that allow people to make "fair use" of them (covered in Chapter Five) and allow libraries and archives to engage in certain preservation activities. Older recordings are subject to their own additional exceptions, too—the "Access" part of the new law ensures that older recordings will enter the public domain on a regular basis, and that anyone can legally make noncommercial uses of older recordings that are no longer being commercially exploited. This makes sense because many of these recordings are no longer being marketed by anyone and you could not find their copyright holders even if you wanted to, so there is no point to copyright stopping people from making valuable uses of them.

What is "fixed" on those pre-1972 recordings? History, in danger of being lost…

What is "fixed" on older recordings? Music, of course: folk, ragtime, jazz, blues, gospel, country, classical. There is also spoken word, old radio broadcasts, and as described by the Copyright Office: "journalists' tapes, oral histories, and ethnographic and folklore recordings." A lot of this material has long faded into obscurity and is of interest only to scholars and hobbyists; and, of course, to Barry, who is always on the lookout for forgotten treasures to put into his remixes.

This history lives on a fragile substrate. Many vintage audio formats deteriorate over time, to the point where they literally disintegrate, or it is impossible to play them again. This means that all of this content is in danger of being lost forever unless people can digitize it. But, when those sound recordings are copyrighted, digitization would be illegal because it involves making a "copy." So Congress included carveouts in the new law to ensure that this history could be preserved for future generations.

3.4 RADIO GA GA[6]

Now let's turn from sound recordings to the next huge technology that transformed music: the *radio*. For that, we need to go back to the 1920s. Here are the comic book characters discussing this innovation. They begin by reviewing some of the developments we covered earlier.

PATRONAGE GAVE US MUSIC DESIGNED FOR THE CATHEDRAL AND THE COURT...
AND THEN WE SAW THE RISE OF THE MASS MARKET. SHEET MUSIC FILLED THE DRAWING ROOMS WITH MELODY BUT THE "PLAYER" WAS THE CUSTOMER. THAT GAVE US MUSIC DESIGNED FOR A LAY AUDIENCE, BUT ALSO FOR AMATEUR PERFORMERS.
BUT, STARTING AROUND 1900, THE PLAYER PIANO AND THE GRAMOPHONE BROUGHT THE SOUND OF PROFESSIONAL MUSICIANS INTO MIDDLE CLASS LIVING ROOMS. SO WHY ARE WE STILL LOOKING AT A CATHEDRAL?
BECAUSE IT ISN'T A CATHEDRAL...
IT'S A RADIO!!

[6] The title of a song by the band "Queen." This was also the inspiration for the artist **Lady Gaga**'s name.

AND NOW...SUPPORTED BY ALKA-SELTZER, AND BUBBLING OVER WITH MIRTH AND MELODY, IT'S...THE NATIONAL BARN DANCE!!
...FEATURING THE YODELING DEZURIK SISTERS!!
YODELING? DEZURIK? SISTERS?
YODEL... LAY-EE-OOH!!
ALSO KNOWN AS THE CACKLE SISTERS. TRICK YODELERS. THEY DID ANIMAL NOISES, TOO.
THAT WAS WHAT WAS PLAYING IN THE 1930s?
SURE, BUT SO WAS LOTS OF OTHER MATERIAL - FROM OPERA TO JAZZ. THE POINT WAS, THE BALANCE HAD SHIFTED AGAIN.
THE MUSIC MADE TO PLEASE THE KING IS DIFFERENT FROM THE MUSIC MADE TO SELL THE KING OF BEERS...
OR TO ATTRACT THE PEOPLE WHO DRINK THE BEER...I SEE. SO RADIO STATIONS WEREN'T SELLING MUSIC. THEY WERE SELLING THE AUDIENCE'S EARS TO ADVERTISERS.
YOU'LL NEVER BELIEVE THE DEAL I HAVE FOR YOU ON THESE BABIES...!
NICE...VERY NICE...
THAT'S A GRISLY IMAGE!

WHICH MEANT THAT, SUDDENLY, PEOPLE MIGHT BE EXPOSED TO DIFFERENT KINDS OF MUSIC – WITHOUT REGARD TO GEOGRAPHY – AS ADVERTISERS TRIED TO REACH THEIR TARGET AUDIENCE.
YOU COULD LISTEN TO THE NEW YORK PHILHARMONIC IN A BARBERSHOP...
OR JAZZ IN A PENTHOUSE OVERLOOKING CENTRAL PARK...
WHEN THEY GET TO THE "RONDO" IN THE PATHETIQUE I SOB LIKE A BABY, YOU KNOW...MY HAND JUST SHAKES...
SHAVE FASTER, THEN! ALLEGRO! MOLTO ALLEGRO!
AND NOW, FROM PAUL WHITEMAN AND HIS BOYS, IT'S "MISSISSIPPI MUD"!
WHICH CHANGED THE BALANCE OF POWER BETWEEN SONGWRITERS AND PERFORMERS. NOW A SINGLE ARTIST COULD REACH MILLIONS, COULD BUILD UP A FAN BASE.
EVEN FOR YODELING...AND THE ECONOMICS OF THE INDUSTRY WERE CHANGING, TOO. REMEMBER THE DEBATES BETWEEN PUBLISHERS AND THE RECORDING INDUSTRY?
I THOUGHT WE AGREED TO LICENSE THE WHOLE THING OFF!?

RIGHT, BUT THIS WAS A NEW MARKET. BROADCASTERS HAD TO PAY THEIR LIVE PERFORMERS. DID THEY HAVE TO PAY COMPOSERS? WAS THIS A "PUBLIC PERFORMANCE"?
WELL, DUH!
NOT REALLY. THE COMPOSERS' GROUP – ASCAP – COLLECTED MONEY FOR "FOR PROFIT" PUBLIC PERFORMANCES. BROADCASTERS POINTED OUT THAT THEY WERE GIVING THE MUSIC AWAY FOR FREE AND MIGHT EVEN BE GETTING THE COMPOSERS NEW CUSTOMERS!
THOSE ARE THE SAME ARGUMENTS THAT FILE SHARERS MADE!
EXACTLY!
BUT THE BROADCASTERS LOST. IN 1923 A COURT RULED THAT RADIO PERFORMANCES WERE "FOR PROFIT" SO THEY HAD TO PAY FEES.
"THE DEFENDANT IS NOT AN 'ELEEMOSYNARY INSTITUTION'...COPYRIGHT OWNERS AND THE MUSIC PUBLISHERS THEMSELVES ARE PERHAPS THE BEST JUDGES OF THE METHOD OF POPULARIZING MUSICAL SELECTIONS..."
THE NEGOTIATIONS WERE SO STORMY, THE BROADCASTERS FORMED THEIR OWN GROUP – BMI – AS AN ALTERNATIVE FOR COMPOSERS TO JOIN. THOSE ARE THE MAIN OPTIONS TO THIS DAY. I'M STILL TRYING TO WORK OUT WHICH ONE TO JOIN.
ASCAP WAS PRETTY EXCLUSIONARY.
STYLISTICALLY, TOO. NEW KINDS OF MUSIC DIDN'T GET EASY ACCEPTANCE. LOUIS ARMSTRONG DIDN'T GET MEMBERSHIP UNTIL 1939, YEARS AFTER HE HAD BECOME FAMOUS.
ASCAP MEMBERS
DOESN'T LOOK LIKE A VERY DIVERSE GROUP!

How did radio change things? The comic excerpt provides some highlights. For listeners, it offered exposure to more kinds of music than ever before. Now, to hear a live performance, you no longer had to be there—it came to you, over the air, for free! All you needed was a radio nearby. You could hear recordings too, without having to go out and buy them. (Initially playing recordings on the radio was banned, so you would either hear a live show, or radio stations would hire their own musicians to play the songs. But this ban didn't last.) This all transformed the way that people discovered music. Before, you had to seek out music. Now, it could find you. What became popular? The tunes that were playing on the radio.

For *performers*, there was a new kind of national recognition. Their audience was not limited to the nightclub or concert hall; they could perform instantly for millions. A captivating voice or virtuosic touch could bring widespread celebrity. The airwaves could make someone like Calandra a household name.

The Golden Age of Radio

Before TV came along in the 1950s, radio was a primary form of entertainment. People were not just listening to music, they were listening to the kinds of things they later watched on TV: news, sports, comedy, mystery, drama, educational shows, variety shows, quiz shows, soap operas, and more.

It is striking to contemplate how central radio was to people's lives. President Roosevelt's "fireside chats" sometimes reached over 60 million Americans – almost 80 percent of the adult radio audience – as he laid out the New Deal, or provided updates on World War II. Nobel-prize winning novelist Saul Bellow memorably described the experience of hearing Roosevelt's voice emanate from cars that had pulled over by the side of the road to listen to him: "They had rolled down the windows and opened the car doors. Everywhere the same voice, its odd Eastern accent, which in anyone else would have irritated Midwesterners. You could follow without missing a single word as you strolled by. You felt joined to these unknown drivers, men and women smoking their cigarettes in silence, not so much considering the President's words as affirming the rightness of his tone and taking assurance from it."

Radio also increased musical *diversity* by allowing music to cross cultural and geographic boundaries. People could tune into everything from jazz at New York's Cotton Club, to country at the Grand Ole Opry, to ragtime, classical concerts, ballroom music, or Tin Pan Alley hits. During a time of Jim Crow laws and legally enforced segregation, this also meant that Black music could cross *racial* boundaries. (We will discuss music and race in America further in Chapter Thirteen.) Some listeners held on to their prejudices and sent off angry letters to their radio stations. But others welcomed the opportunity to broaden their horizons and appreciate our common humanity. As University of Michigan Professor Susan Douglas described it, radio "allowed for a turnstile between the races that very few other media did."

In addition, radio brought us *a new industry—broadcasting*—with a new business model. Instead of selling music directly to consumers in the form of sheet music or recordings, broadcasters were selling the consumers' attention to *advertisers* hoping to reach their target audience. Ad-supported business models did not start with the internet. What kind of music

was rewarded? Music that got people to tune in, and stay tuned in. Entertaining live shows. Radio-ready hits. **Note how far we have come since patronage, when emperors and churches decided what kind of music got made. With copyright, the market decides, and the markets are proliferating—sheet music, live performances, recordings, and now radio.**

3.5 THE "BLANKET" LICENSE FOR PERFORMANCES

To continue a theme of this chapter, all of this led to developments in the *law*. At the time, composers and publishers had an exclusive right over public performances, but only if those performances were "for profit." (As you learned in the previous chapter, this "for profit" requirement is no longer part of copyright law; now songwriters get paid for performances as long as they're "public.") The most obvious for-profit performances were live shows, where money was taken at the door. But what if the audience was not directly charged for the performance? In 1917, the Supreme Court said that when restaurants and hotels played music, it was also for profit, because it was part of the overall experience that customers were paying for. As explained by Justice Oliver Wendell Holmes: "The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal." So, what about music on the radio? As you read in the comic, the radio stations argued that their broadcasts were not "for profit" because there was no direct payment from listeners. They also pointed out that they were providing free publicity that boosted the publishers' music sales. Those arguments were unavailing, and in 1923, a court ruled that radio broadcasts were indeed "for profit" and radio stations had to pay performance fees.

These **performance fees** were administered by a "**performing rights organization**" or "PRO" called the American Society of Composers, Authors and Publishers—"ASCAP"—through something called a "**blanket license**." Unlike the compulsory license you just learned about, this blanket license was not part of the law itself, and did not require copyright owners to grant a license when certain conditions were met. Instead, it was a private mechanism that the industry used to streamline the collection and distribution of performance fees. Its use was voluntary, but it was the norm because it was the most efficient way to handle these fees—negotiating individual licenses for every play of every song by every station would not have been practical. The blanket license allowed radio stations—or any other business paying to play music for customers, such as theaters and restaurants—to pay ASCAP a single blanket fee for its full music catalog. ASCAP then distributed these fees to its members. This made membership an important prerequisite for getting paid. Unfortunately, in the early days of radio, many artists whom ASCAP members did not see as sufficiently "respectable," including Black artists and country artists, were not able to become ASCAP members. Social and aesthetic prejudice had economic consequences.

It was difficult for radio broadcasters to negotiate better fees with ASCAP, since it was the only game in town. So in 1939, the broadcasters formed their own performing rights

organization called Broadcast Music, Inc. or BMI, that would then collect performance fees for its own members. BMI welcomed some of the artists whom ASCAP rejected. When ASCAP threatened more rate increases, radio stations boycotted their music, playing only BMI or public domain music. This led to a greater diversity of music on the airwaves because stations were playing music written by Black artists who could not join ASCAP. However, even though those artists got exposure, it did not mean they got paid—while BMI artists were compensated, many Black musicians did not have copyright in their works because their songs were not written down (back then, that was the only accepted form of "fixation"), or because of the industry's discriminatory practices. We will turn to this in more detail in Chapter Thirteen.

If you read about the music business, you will encounter discussion of "PROs" like ASCAP and BMI and "blanket licenses." Now you know what those terms mean and understand something about their history. ASCAP and BMI are still collecting performance royalties today, and they are still the two largest performing rights organizations, though there are others. In fact, they have so much market power that the government sued them for antitrust violations. That lawsuit was settled in 1941 by agreements called "consent decrees" with the US Department of Justice that try to ensure that they do not engage in anticompetitive practices. Those consent decrees have since been updated and still cover their operations today.

SUMMARY

So, now you know about the separate © composition and ℗ sound recording rights. You know what "mechanicals" are and why Congress created a compulsory license. You know about performing rights organizations and the blanket licenses they collect for public performances. Your map of copyright's terrain is filling in! Here is a brief summary of the exclusive rights over musical compositions that you learned about in Chapter Two and the new material you learned about in this chapter: the compulsory license for mechanical reproductions and blanket license for public performances, plus the separate sound recording right (Figure 3.4). Chapter Eleven will add to this basic structure by filling in more of the details of the current music licensing landscape.

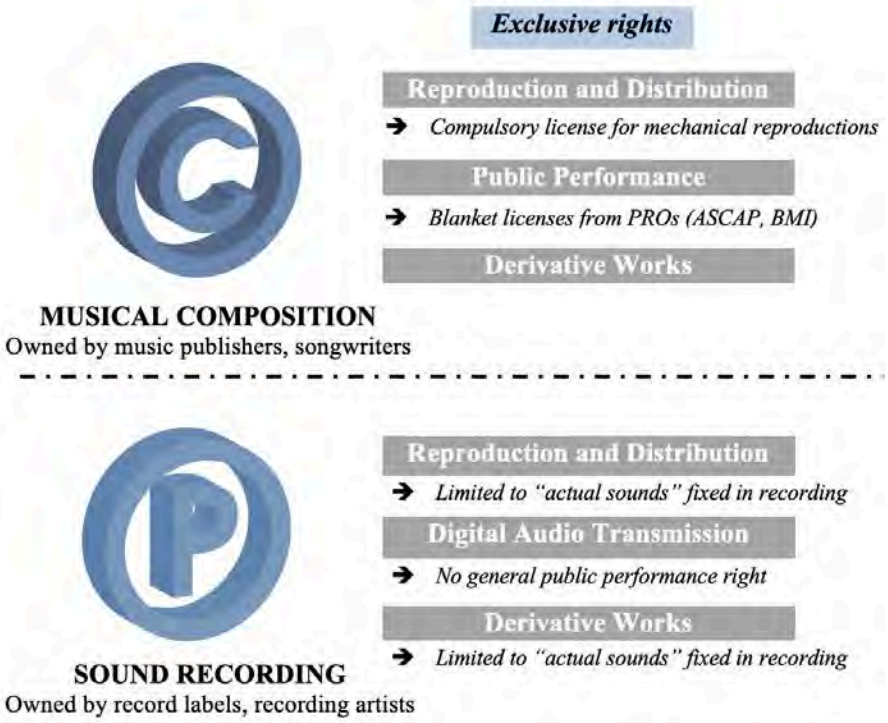

Exclusive rights
Reproduction and Distribution
➔ Compulsory license for mechanical reproductions
Public Performance
➔ Blanket licenses from PROs (ASCAP, BMI)
Derivative Works
MUSICAL COMPOSITION
Owned by music publishers, songwriters
Reproduction and Distribution
➔ Limited to "actual sounds" fixed in recording
Digital Audio Transmission
➔ No general public performance right
Derivative Works
➔ Limited to "actual sounds" fixed in recording
SOUND RECORDING
Owned by record labels, recording artists

Figure 3.4

In this chapter you have followed more of copyright's trajectory and seen the history leading up to it. As promised, the road has been neither straight nor predictable. Consider the stories of the two revolutionary technologies within this chapter. Both sound recordings and radio brought about enormous societal benefits, as well as a new market. Initially they developed without copyright getting involved. Then there were legal disputes, with existing rights holders wanting a part of the new market, and the new players arguing that the law did not cover their activities, and that they were benefiting not only the public, but the rights holders too. Eventually a new royalty mechanism is established. The solution is *specialized*—the compulsory license only applies to mechanical reproductions of compositions, and the blanket license only applies to public performances of compositions. The complexities multiply. You live with another technology that once seemed revolutionary—the internet. What happened when the *internet* transformed the music industry *again*? We will find out in Chapter Eleven (for a preview, see the charts toward the end of the chapter—as you can see, the proliferation of licenses goes way beyond "digital audio transmissions").

As mentioned in the previous chapter, the law is context-dependent, and copyright's development has been driven by changing technologies, attitudes, and payment systems. Were we to step back and envision music copyright anew, we might formulate the whole system differently. But we legislate incrementally, with each technological breakthrough yielding measures that are shaped by industry pressures and entrenched business models.

The law has been on a journey, and that journey continues today. In the next chapter, we will delve into another part of that journey: how the law has tried to balance control and freedom in musical creativity. As you have learned, copyright has both rights and exceptions that are intended to motivate creativity. But it is not always obvious what shape these provisions should take in order to achieve that goal, particularly when applied to music. What exactly does copyright cover, and what does it leave free for all musicians to use? How does it deal with the fact that similar music can be found in many songs? And why is music so hard for copyright law to handle?

4
Owning Music

Inside this chapter

4.1 SOURCES OF COPYRIGHT LAW 84
4.2 A COPYRIGHT INFRINGEMENT FLOW CHART 86
4.3 WHAT DO YOU OWN? 89
4.4 HOW DO YOU GET A COPYRIGHT? 97
4.5 WHAT DOES COPYRIGHT COVER? 98
4.6 ORIGINALITY 99
4.7 THE IDEA/EXPRESSION DICHOTOMY 104
4.8 SCÈNES À FAIRE 105
4.9 WHAT ARE YOUR EXCLUSIVE RIGHTS? ... 107
4.10 THERE'S SOMETHING ABOUT MUSIC… 108
4.11 WHAT IS MUSIC? 111

You now know about copyright's rationale and its history. You have read about two revolutionary technologies—sound recordings and radio—and how the law adjusted to them. In this chapter, we will begin our detailed exploration of the contours of music copyright. What do you own, and what remains free for others to borrow? What can you stop others from doing? What do "originality," "idea," or "expression" mean in terms of copyright law? Do copyright's rules make sense when applied to music, as opposed to books or other art forms? And—returning to one of the themes in the previous chapter—how do we figure out what falls within the © composition copyright, and what falls within the separate ℗ sound recording copyright?

Keep in mind that the law is not a static thing—just as it has changed throughout history, it will continue to change in the future in response to both technological and economic forces. With regard to owning music, courts are still trying to draw the right line between what aspects of music should be owned and what aspects should remain free for all musicians to use. We will see decisions grappling with that question in subsequent chapters, including some from the last ten years. Because we are about to embark on a tour of some fascinating copyright cases, this chapter will start with a primer on federal courts and the case law they produce.

4.1 SOURCES OF COPYRIGHT LAW

Let us start with the most basic aspects of what we mean by "the law." (This book is written for those both with and without legal training. Those of you who are legally trained can skip to the next section.) So far we have talked a lot about the Copyright Act. This is the *statute* passed by Congress and it is the source of copyright's exclusive rights, among many more rules. It is a federal law rather than a state law, meaning that it applies across the country. But in the United States statutes are only part of what constitutes "the *law*." *Courts* also play an important role in *interpreting* those statutes as well as making rules of their own. The law established by the courts through **judicial opinions** is called "**common law**." Many of the important doctrines within copyright law are not spelled out in the Copyright Act, and instead come from such opinions. The court decisions in this book set out everything from an intriguing two-part test for copyright infringement to the circumstances under which technology producers are liable for the infringing activities of their users.

You will see excerpts from several judicial opinions in this book. To make reading those excerpts easier, I have edited out interstitial citations and formatting. If you pull up the actual opinion, you will see that the original text is denser. You may also see that there are many plaintiffs and defendants listed in the heading. Lawyers generally refer to a case with the name of just one of the parties on either side. So *Gray v. Hudson* refers to the lawsuit filed by Marcus Gray and two other songwriters against Katheryn Hudson (Katy Perry's birth name) and lots of other songwriters as well as music companies.

Here is a high-level overview of how our judicial system functions. Some of the terms that you will encounter are highlighted to make them easier to recognize going forward. Many are also included in the book's glossaries. Note that it is only a general overview; if you go to law school you will discover that the system gets far more intricate. But it should provide you with the basic information you need to understand the forthcoming cases.

Copyright cases are decided by federal courts. In the United States, federal courts are divided geographically into judicial **circuits**. A map of those circuits is shown in Figure 4.1. Many of the cases you are reading about in this book are from the Ninth Circuit. It is depicted in yellow on the map, indicated with an arrow. This circuit includes many states, but one of them is California, where key players in the entertainment industry are located. So the courts in the Ninth Circuit decide a lot of important music cases, including the watershed decisions featured in Chapters Seven and Eight.

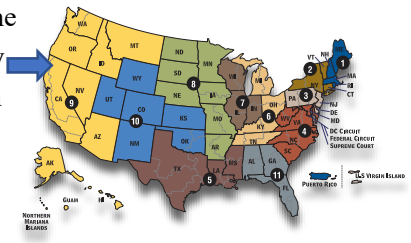


Figure 4.1

The **Supreme Court** is the highest court in the land. Under the Supreme Court are the **Courts of Appeals**. There are thirteen courts of appeals—one in each judicial circuit and a specialized court with nationwide jurisdiction over certain subjects such as patent law. Below them are ninety-four **district courts**, also called trial courts. Generally a copyright case

begins in front of a district court when a lawsuit is filed. In this book we will refer to the people who are claiming copyright infringement as the "**plaintiffs**" and the people being sued as "**defendants**." (This sounds obvious but cases sometimes use more technical terms depending on the stage or origins of the proceedings.) The remedies for copyright infringement include **injunctions** that restrain further infringement and monetary **damages** that compensate rights holders for infringement.

If a copyright claim is really weak, the judge might grant a **motion to dismiss** throwing out the case. If the judge thinks they can make a decision based on what the law says, they can grant **summary judgment** in favor of either party. However, if there are genuine disputes about the *facts* in the case, the judge will send the dispute to a jury, which issues a **verdict**. Courts can overturn a jury verdict if they decide it is unsupported by the evidence—in this book you will see both decisions that were reluctant to disturb jury verdicts and decisions that were willing to do so. Appeals of district court decisions go to the Court of Appeals in their circuit, which decides whether or not the district court correctly applied the law. District court cases are heard by a single judge and regular appeals are heard by panels of three judges. If the appellate judges disagree there might be a **majority opinion**—that is the opinion that becomes law—and a **dissenting opinion**. You will see these various legal processes in action in the cases we discuss.

Under the doctrine of *stare decisis*—roughly translated, Latin for "to stand by things decided"—courts have to follow the rulings of certain prior courts, called **precedent**, when making their decisions. A court's ruling is often referred to as its **holding**. All federal courts are bound by Supreme Court precedent. Within each judicial circuit, the district courts have to follow the precedent from the Court of Appeal in that circuit. District court decisions do not serve as binding precedent on other district courts, though they may be "persuasive authority" when judges look to them for guidance. Even though copyright is governed throughout the country by the same federal law, sometimes courts in different circuits will disagree about how to interpret or apply it. This means that there can be variations in the legal rules applied in different circuits. When the Courts of Appeals in different circuits disagree, we have what is called a **circuit split**. We will see such a circuit split when we get to sampling in Chapter Nine.

It is worth noting here that, in general, *very few* music copyright cases reach the point where there is a judicial opinion or a jury verdict. Most of the time, when there is a copyright dispute, the plaintiff and defendant reach a private agreement called a **settlement**, generally with confidential terms. Settlements are common because they are less expensive and exhausting than continuing a lawsuit. Regardless of whether you think you *should* win, there is no guarantee that you will, and the cost of a lawsuit can easily reach hundreds of thousands or millions of dollars. This means that the cases you are reading about in this book are unusual. But they are also *influential*. Because our legal system relies on the precedent of court decisions, these cases establish the ground rules that reverberate well beyond the courtroom, guiding settlement negotiations, industry practices, and even the creative process.

All of this brings us to an important point. The *law* that we get from statutes and court opinions is only part of the larger framework of rules that govern your behavior. In reality, the rules that Anita, Barry, and Calandra need to navigate as they make their music or embark on their careers go beyond what you might think of as "the law." There are the *legal doctrines* we are about to cover. There are the *industry practices* layered on top of that foundation: sometimes these practices reflect what the law says, but sometimes they go beyond what the law requires. As you will read in later chapters, the music business has invented its own licensing schemes and clearance practices. There is the *ideal* of what the law is trying to achieve—"promoting the progress," covered in Chapter Two—and the different way that things actually turn out in practice. The upcoming case studies will provide an illustration of this phenomenon. And there are *rumors* and misinformation about what people *think* the law says. Sadly, though many people believe otherwise, there is no hard and fast rule that lets you use six notes or ten seconds of a song; this book will seek to dispel some of the erroneous myths about copyright. In our tour of music copyright we will be covering both the law "on the books"—the statutory rules and court decisions—and the bigger picture of the law "in action."

4.2 A COPYRIGHT INFRINGEMENT FLOW CHART

What do Beyoncé, Taylor Swift, Olivia Rodrigo, Childish Gambino, Kendrick Lamar, Travis Scott, Ed Sheeran, Drake, The Weeknd, Katy Perry, Pharrell Williams, and Bad Bunny have in common? They are all successful artists. And they have all faced copyright infringement accusations. A *lot* of songs sound the same. And this generates a *lot* of lawsuits. As it is sometimes said: "Where there's a hit, there's a writ."

You have probably heard a song and thought: "Hey, that sounds just like this other song!" There are websites and videos galore pointing out such similarities. What if they give rise to a lawsuit? You may have an intuition about how particular disputes would play out. But the legal apparatus that determines when there is *copyright infringement* might surprise you. This is your opportunity to find out what actually happens when these cases go to court.

So how does copyright law determine when similarities are OK, and when they are not? **The answer *matters*.** It matters for artists and for the music business, of course. It also matters for fans and for our culture; for the *music* that is so important to us.

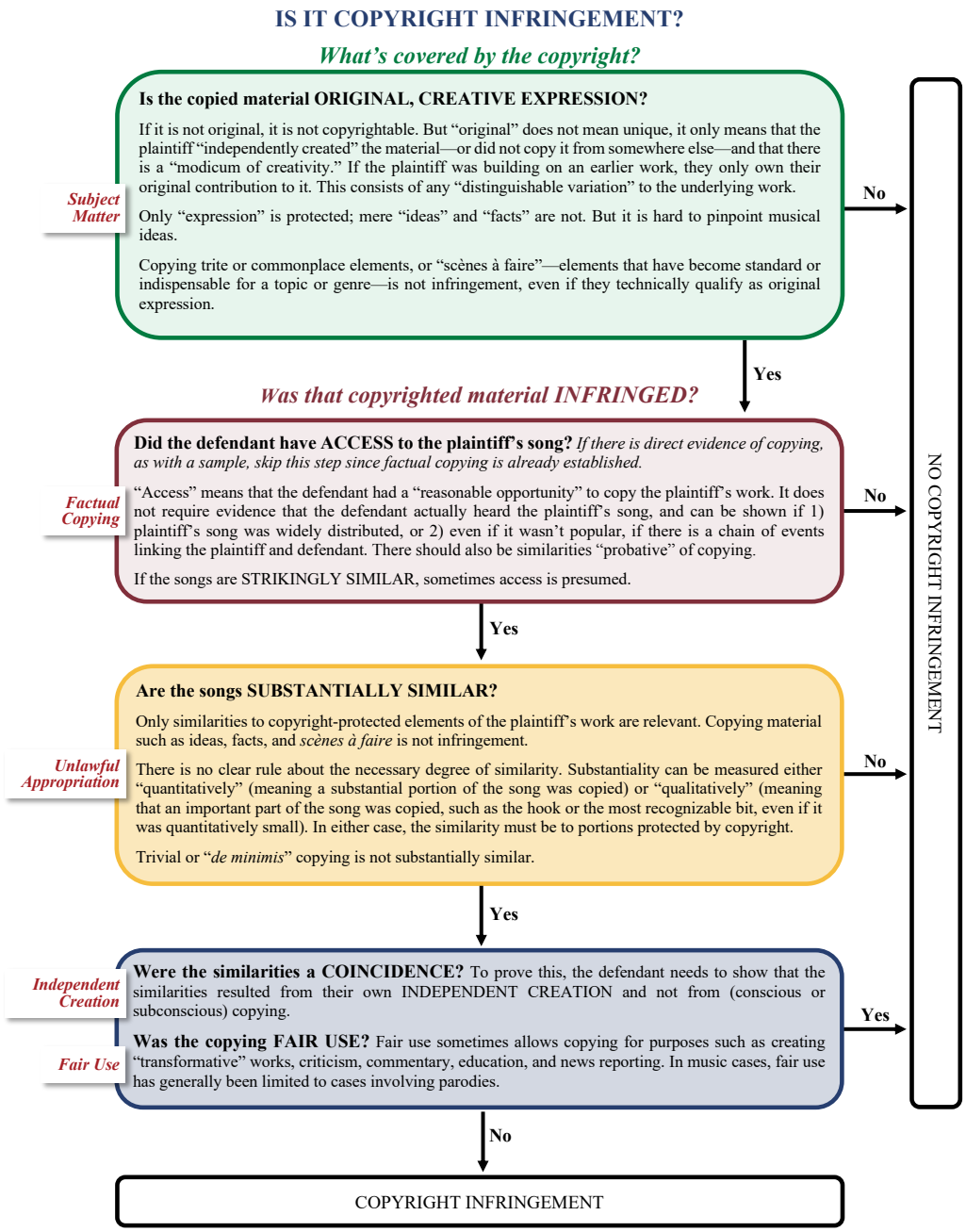
Artists—who are both *authors* of their own copyrighted material and *users* of other people's copyrighted material—are potentially on either side of a dispute. As copyright owners, they need to be able to turn to copyright law when someone steals their music. This is a key part of how the law *supports* creativity. When the Beach Boys took the music from Chuck Berry's "Sweet Little Sixteen" for "Surfin' USA," Berry rightly received songwriting credit and royalties after a lawsuit was threatened. When Led Zeppelin lifted music and lyrics from blues musicians, the band rightly had to share credit and royalties with the original authors. They should have done so in the first place. These takings are well over the line. But sometimes the similarities between songs are coincidental, or consist of common stylistic elements or basic musical building blocks. Allowing one artist to own these—and exclude other musicians from

using them—would *get in the way of creativity*. It is hard to make music if you are worried about landing in court every time there is an echo. Increasingly we have seen disputes that fall into the latter category.

This book will necessarily focus on cases that are controversial or on the margin rather than the easy, straightforward ones. But as you read, keep in mind that there are *many* instances of copying that are clearly infringement. And even when the law teeters off balance, this does not mean that copyright in general is a bad thing. Quite the contrary. The whole point of the system is to promote creativity. The question is how to calibrate its various features so that it works as intended.

The next five chapters of this book will explore how copyright deals with musical and lyrical similarities. What can you own? When do similarities amount to infringement? We will walk through the doctrinal steps and see how they were applied in three recent high-profile cases—one that appeared to seriously encroach on creativity and two that tried to restore some freedom to build upon necessary creative ingredients.

Figure 4.2 is a flow chart outlining the legal framework for showing copyright infringement. It provides a snapshot of the formal stages of the analysis. The next time you hear a song that sounds like another one, ask yourself, based on what you are about to learn, "is it copyright infringement?" The chart should provide you with a roadmap for answering that question. Essentially, the steps are as follows. First you have to figure out whether the similar material is the kind of thing that can be owned at all, or instead is something that copyright leaves free. Next, if the material is copyrightable, you ask whether the defendant actually copied it from the plaintiff's song, or whether it seems likely that they did so—if there was no copying, there cannot be copyright infringement. If the answer to that is yes, then you look at whether the copying was enough to cross the line into being unlawful. Finally you look at some possible defenses. The defendant can try and prove that they came up with the material themselves, making the similarities a mere coincidence. Or they can argue that the copying is legal because it is a "fair use" that serves a valuable purpose and does not unduly interfere with the plaintiff's market interests.


IS IT COPYRIGHT INFRINGEMENT?
What's covered by the copyright?
Is the copied material ORIGINAL, CREATIVE EXPRESSION?
If it is not original, it is not copyrightable. But "original" does not mean unique, it only means that the plaintiff "independently created" the material—or did not copy it from somewhere else—and that there is a "modicum of creativity." If the plaintiff was building on an earlier work, they only own their original contribution to it. This consists of any "distinguishable variation" to the underlying work.
Subject Matter
Only "expression" is protected; mere "ideas" and "facts" are not. But it is hard to pinpoint musical ideas.
Copying trite or commonplace elements, or "scènes à faire"—elements that have become standard or indispensable for a topic or genre—is not infringement, even if they technically qualify as original expression.
No
Yes
Was that copyrighted material INFRINGED?
Did the defendant have ACCESS to the plaintiff's song? If there is direct evidence of copying, as with a sample, skip this step since factual copying is already established.
Factual Copying
"Access" means that the defendant had a "reasonable opportunity" to copy the plaintiff's work. It does not require evidence that the defendant actually heard the plaintiff's song, and can be shown if 1) plaintiff's song was widely distributed, or 2) even if it wasn't popular, if there is a chain of events linking the plaintiff and defendant. There should also be similarities "probative" of copying.
If the songs are STRIKINGLY SIMILAR, sometimes access is presumed.
No
Yes
Are the songs SUBSTANTIALLY SIMILAR?
Unlawful Appropriation
Only similarities to copyright-protected elements of the plaintiff's work are relevant. Copying material such as ideas, facts, and scènes à faire is not infringement.
There is no clear rule about the necessary degree of similarity. Substantiality can be measured either "quantitatively" (meaning a substantial portion of the song was copied) or "qualitatively" (meaning that an important part of the song was copied, such as the hook or the most recognizable bit, even if it was quantitatively small). In either case, the similarity must be to portions protected by copyright.
Trivial or "de minimis" copying is not substantially similar.
No
Yes
Were the similarities a COINCIDENCE? To prove this, the defendant needs to show that the similarities resulted from their own INDEPENDENT CREATION and not from (conscious or subconscious) copying.
Independent Creation
Was the copying FAIR USE? Fair use sometimes allows copying for purposes such as creating "transformative" works, criticism, commentary, education, and news reporting. In music cases, fair use has generally been limited to cases involving parodies.
Fair Use
Yes
No
COPYRIGHT INFRINGEMENT
NO COPYRIGHT INFRINGEMENT

In the sections that follow we will discuss each of the stages on the chart in more detail. Note that until we get to Chapter Nine, the cases that we are discussing deal with the © right over the musical composition, not the ℗ right over the sound recording. This is because the claim is "your song sounds too much like mine," not that you copied from a particular *recording* of that song. As you learned in Chapter Three there is no infringement of the sound recording right unless you use the "actual sounds" in a recording. We will get to the ℗ right in Chapter Nine because it deals with sampling directly from recorded music.

4.3 WHAT DO YOU OWN?

Remember your job as Musicland's music czar? You thought about creating property rights over music but fretted about the boundaries of these new rights. What would be owned, and what would remain free? As you will see, people are still fretting over these questions today. **What does it mean to *own* a song? What exactly do you own?**

For the basic rules, let's start at the top of the flow chart. We begin with what lawyers call the "subject matter" of copyright—what you do and do not own.

Subject Matter

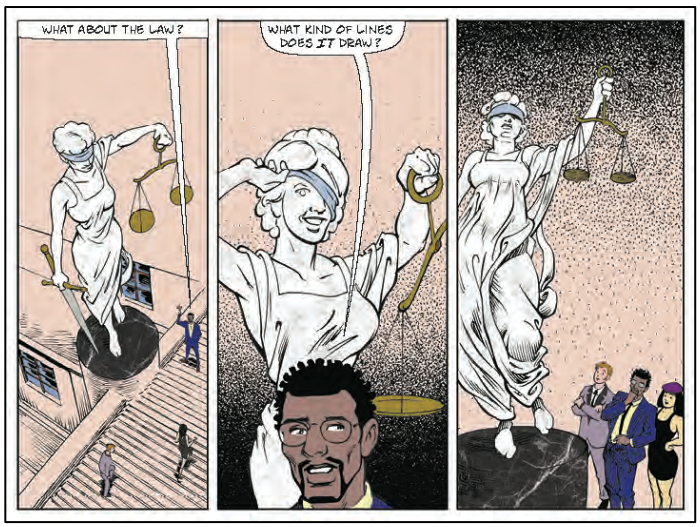
Is the copied material ORIGINAL, CREATIVE EXPRESSION?

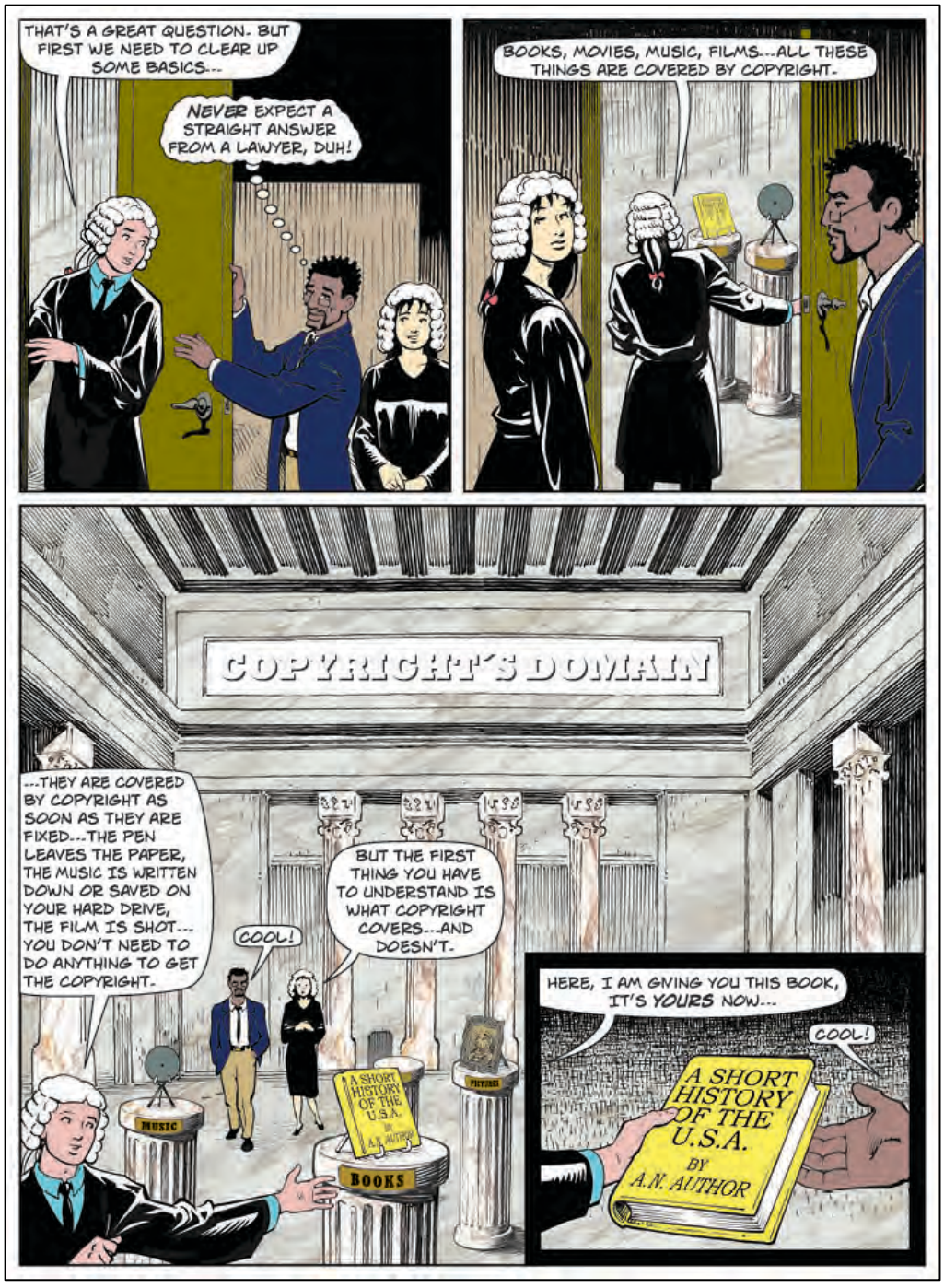
If it is not original, it is not copyrightable. But "original" does not mean unique, it only means that the plaintiff "independently created" the material—or did not copy it from somewhere else—and that there is a "modicum of creativity." If the plaintiff was building on an earlier work, they only own their original contribution to it. This consists of any "distinguishable variation" to the underlying work.

Only "expression" is protected; mere "ideas" and "facts" are not. But it is hard to pinpoint musical ideas.

Copying trite or commonplace elements, or "scènes à faire"—elements that have become standard or indispensable for a topic or genre—is not infringement, even if they technically qualify as original expression.

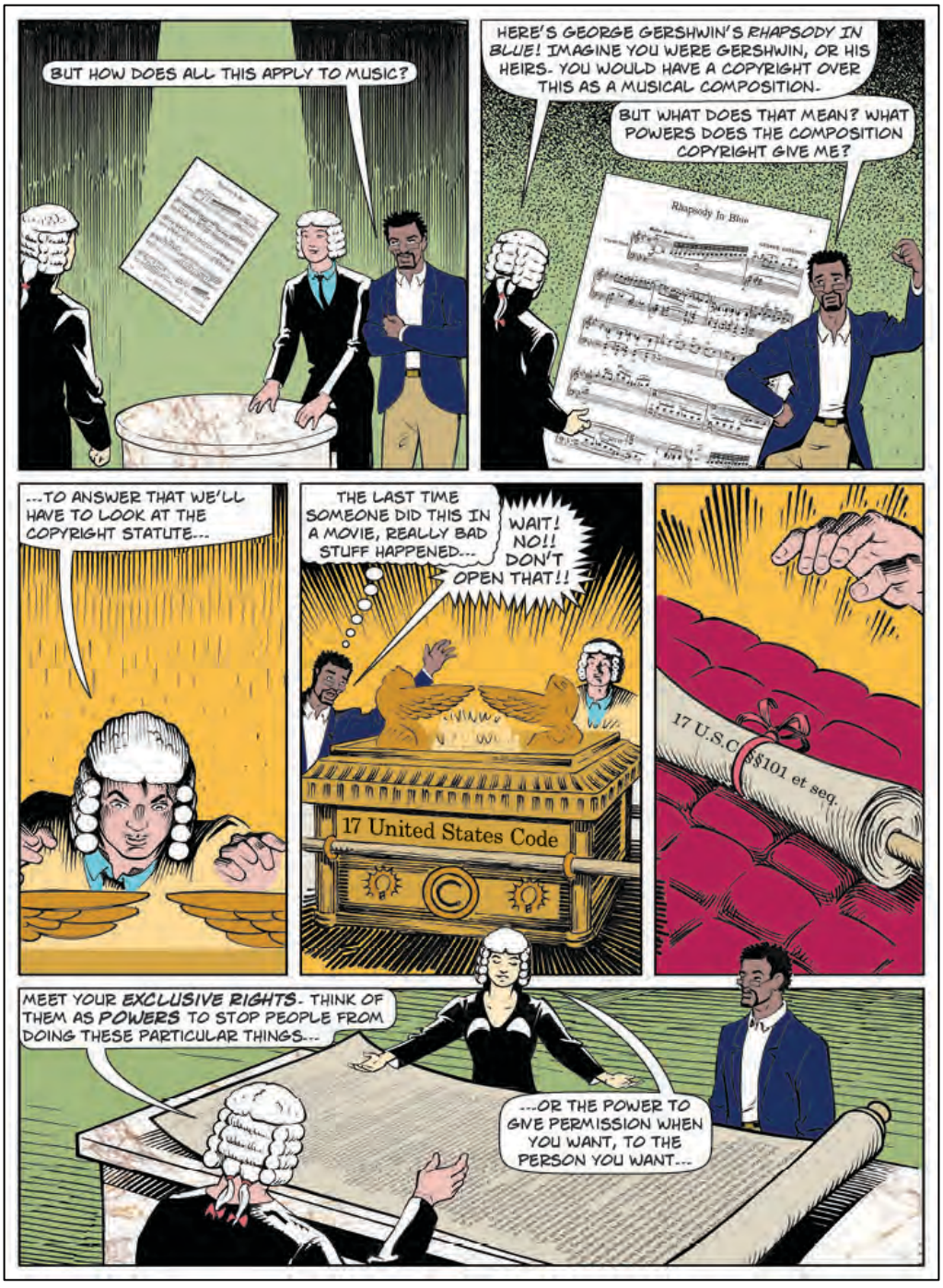
Now we turn to the comic book for an illustrated guide to these rules. This excerpt will be followed by a more detailed analysis of each doctrine.

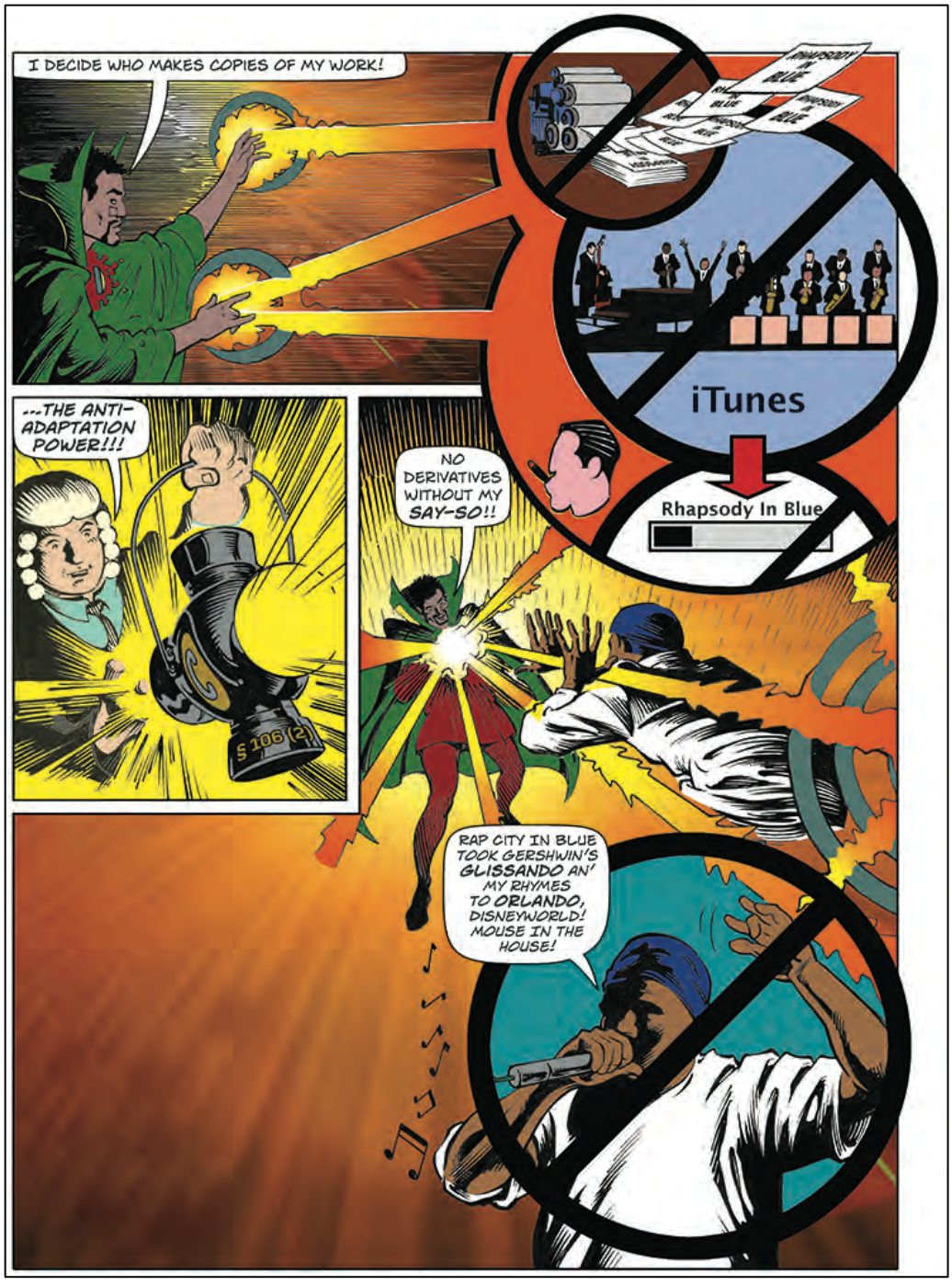



THAT'S A GREAT QUESTION. BUT FIRST WE NEED TO CLEAR UP SOME BASICS...
NEVER EXPECT A STRAIGHT ANSWER FROM A LAWYER, DUH!
BOOKS, MOVIES, MUSIC, FILMS...ALL THESE THINGS ARE COVERED BY COPYRIGHT.
COPYRIGHT'S DOMAIN
...THEY ARE COVERED BY COPYRIGHT AS SOON AS THEY ARE FIXED...THE PEN LEAVES THE PAPER, THE MUSIC IS WRITTEN DOWN OR SAVED ON YOUR HARD DRIVE, THE FILM IS SHOT... YOU DON'T NEED TO DO ANYTHING TO GET THE COPYRIGHT.
COOL!
BUT THE FIRST THING YOU HAVE TO UNDERSTAND IS WHAT COPYRIGHT COVERS...AND DOESN'T.
MUSIC
BOOKS
PICTURES
A SHORT HISTORY OF THE U.S.A. BY A.N. AUTHOR
HERE, I AM GIVING YOU THIS BOOK, IT'S YOURS NOW...
COOL!
A SHORT HISTORY OF THE U.S.A. BY A.N. AUTHOR

YOU OWN THE PHYSICAL OBJECT--- THESE PIECES OF PAPER--THIS BINDING. YOU COULD BURN IT, OR SELL IT, OR GIVE IT AWAY---
AND THE AUTHOR HAS NO RIGHT TO STOP YOU...
THAT DIDN'T LAST LONG.
---AND EVEN INSIDE THE BOOK THERE ARE LOTS OF THINGS THE AUTHOR DOESN'T OWN---
AAAHHHHHH
IDEAS
FACTS
ALL MEN ARE CREATED EQUAL
CHRISTOPHER COLUMBUS 1492
LOUISIANA PURCHASE 1803
DECLARATION OF INDEPENDENCE, NOT U.S. CONSTITUTION, EXPRESSES IDEALS OF AMERICA

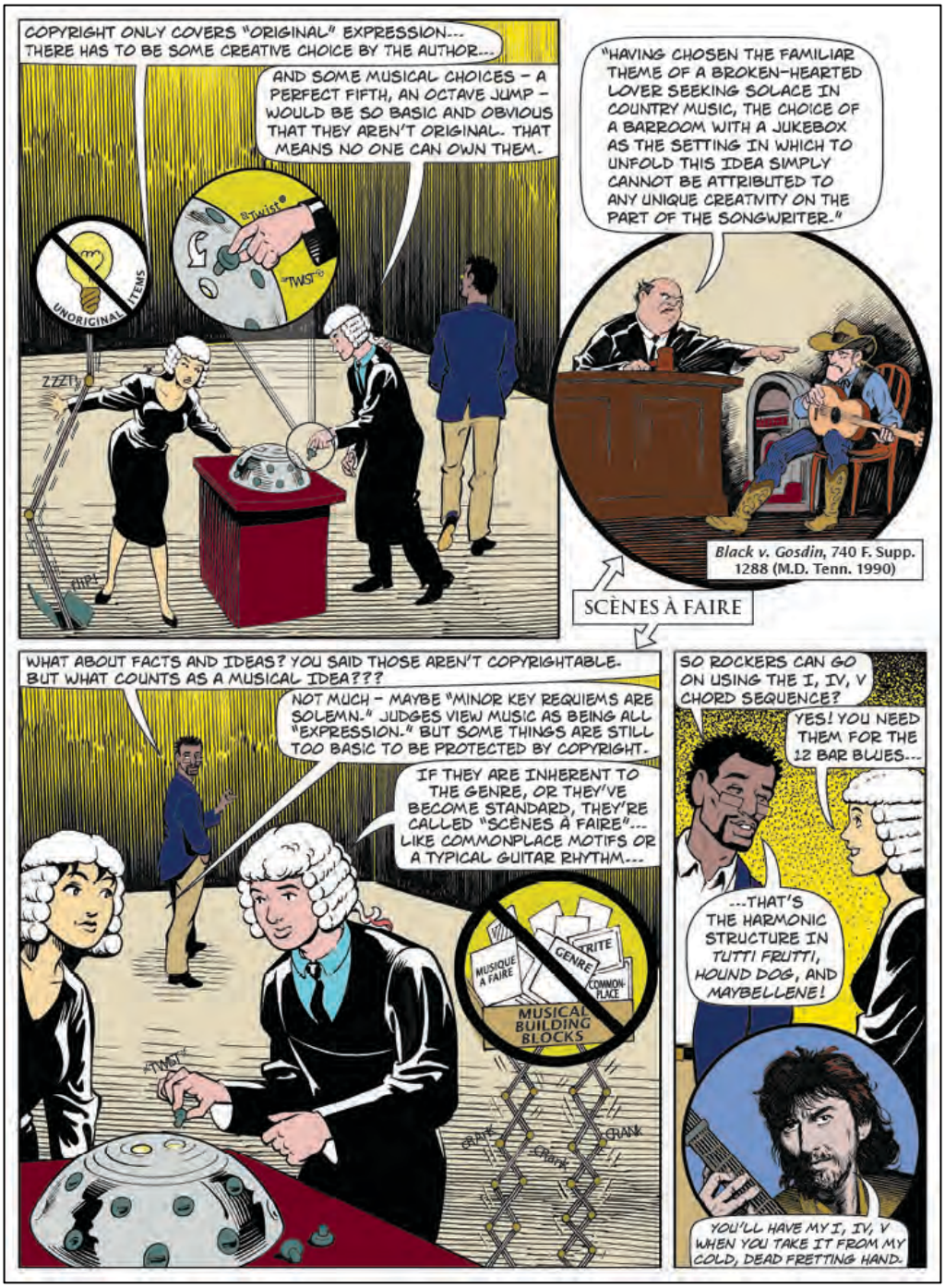
WHAT WAS THAT!!??! AND IS THAT THING GOING TO DO IT AGAIN?
THOSE WERE THE FACTS AND IDEAS IN THAT BOOK, THEY AREN'T COPYRIGHTABLE ---THEY GO IMMEDIATELY INTO THE PUBLIC DOMAIN.
COPYRIGHT COVERS THE AUTHOR'S EXPRESSION, NOT THE IDEAS OR FACTS THEMSELVES.
SO, BOY MEETS GIRL---
---OR EVEN BOY MEETS GIRL AT COLLEGE, FALLS IN LOVE, GIRL DIES---
---ISN'T COPYRIGHTABLE--- BUT ERICH SEGAL'S LOVE STORY ---HIS EXPRESSION OF THOSE IDEAS---IS COPYRIGHTED.
Ali MacGraw Ryan O'Neal
Love Story
Love means never having to say you're sorry.
---HOW I CRIED AT THAT MOVIE!
WAIT A MINUTE. WHAT ABOUT THAT POSTER? ISN'T IT COPYRIGHTED? DO YOU HAVE PERMISSION TO USE THAT PICTURE?
NO, IT'S A FAIR USE.* FAIR USE MEANS THAT YOU CAN TAKE THE AUTHOR'S EXPRESSION WHEN YOU USE IT FOR SUCH PURPOSES AS CRITICISM OR COMMENTARY, PARTICULARLY IF YOUR USE IS TRANSFORMATIVE.
*FOR MORE ON FAIR USE, SEE BOUND BY LAW? - EDS.
---LIKE A QUOTATION IN A CRITICAL BOOK REVIEW---
HARSH!
REVIEW
A Short History of the U.S.A.
We wish it had been shorter.
Dyonne Bovril


BUT HOW DOES ALL THIS APPLY TO MUSIC?
HERE'S GEORGE GERSHWIN'S RHAPSODY IN BLUE! IMAGINE YOU WERE GERSHWIN, OR HIS HEIRS- YOU WOULD HAVE A COPYRIGHT OVER THIS AS A MUSICAL COMPOSITION.
BUT WHAT DOES THAT MEAN? WHAT POWERS DOES THE COMPOSITION COPYRIGHT GIVE ME?
Rhapsody In Blue
---TO ANSWER THAT WE'LL HAVE TO LOOK AT THE COPYRIGHT STATUTE---
THE LAST TIME SOMEONE DID THIS IN A MOVIE, REALLY BAD STUFF HAPPENED---
WAIT! NO!! DON'T OPEN THAT!!
17 United States Code
17 U.S.C. §101 et seq.
MEET YOUR EXCLUSIVE RIGHTS- THINK OF THEM AS POWERS TO STOP PEOPLE FROM DOING THESE PARTICULAR THINGS---
---OR THE POWER TO GIVE PERMISSION WHEN YOU WANT, TO THE PERSON YOU WANT---


I DECIDE WHO MAKES COPIES OF MY WORK!
iTunes
Rhapsody In Blue
...THE ANTI-ADAPTATION POWER!!!
§ 106(2)
NO DERIVATIVES WITHOUT MY SAY-SO!!
RAP CITY IN BLUE TOOK GERSHWIN'S GLISSANDO AN' MY RHYMES TO ORLANDO, DISNEYWORLD! MOUSE IN THE HOUSE!

AND NO DISTRIBUTING COPIES OF IT...
BORIS' BACK-ALLEY SHEET MUSIC 50 RUBLES
RHAPSODY IN BLUE
UNAUTHORIZED
...OR PUBLICLY PERFORMING IT EITHER!!!
I CONTROL COPYING, ADAPTATION, PERFORMANCE AND DISTRIBUTION!!!
I AM THE KING OF THE COPYRIGHT WORLD!!!
AHEM...THERE'S JUST ONE THING...
WHAT?

ALL OTHER COPYRIGHT HOLDERS HAVE THE SAME POWERS OVER YOU!
SO THEY CAN STOP ME FROM MAKING ANY KIND OF ADAPTATION? ANY REFERENCE, QUOTATION, PARODY? IS THIS TOTAL CONTROL?
NOT AT ALL. SOMETIMES PEOPLE TALK AS THOUGH COPYRIGHT WAS AN ABSOLUTE PROPERTY RIGHT...
...BUT ACTUALLY IT IS POROUS, FULL OF EXCEPTIONS...
RHAPSODY IN BLUE
THE FIRST IS TERM LIMITS. BEETHOVEN, MOZART, BACH – MOST MUSIC FROM OVER 95 YEARS AGO IS FAIR GAME, EITHER BECAUSE THERE WAS NEVER A COPYRIGHT OR IT HAS EXPIRED.
TWIST
SO PAUL MCCARTNEY COULD USE BACH'S BOURÉE IN BLACKBIRD. WHEN BACH WROTE IT, THERE WASN'T A COPYRIGHT. EVEN IF THERE HAD BEEN, IT WOULD HAVE EXPIRED LONG AGO.
SAME WITH THE CLASSICAL RAGAS THE BEATLES USED.
OR PACHELBEL'S CANON. THAT'S BEEN USED BY EVERYONE FROM CATCH 22 TO COLDIO.
...COOLIO...
AH!


COPYRIGHT ONLY COVERS "ORIGINAL" EXPRESSION--- THERE HAS TO BE SOME CREATIVE CHOICE BY THE AUTHOR---
AND SOME MUSICAL CHOICES – A PERFECT FIFTH, AN OCTAVE JUMP – WOULD BE SO BASIC AND OBVIOUS THAT THEY AREN'T ORIGINAL. THAT MEANS NO ONE CAN OWN THEM.
UNORIGINAL ITEMS
TWIST
ZZZT
"HAVING CHOSEN THE FAMILIAR THEME OF A BROKEN-HEARTED LOVER SEEKING SOLACE IN COUNTRY MUSIC, THE CHOICE OF A BARROOM WITH A JUKEBOX AS THE SETTING IN WHICH TO UNFOLD THIS IDEA SIMPLY CANNOT BE ATTRIBUTED TO ANY UNIQUE CREATIVITY ON THE PART OF THE SONGWRITER."
Black v. Gosdin, 740 F. Supp. 1288 (M.D. Tenn. 1990)
SCÈNES À FAIRE
WHAT ABOUT FACTS AND IDEAS? YOU SAID THOSE AREN'T COPYRIGHTABLE. BUT WHAT COUNTS AS A MUSICAL IDEA???
NOT MUCH – MAYBE "MINOR KEY REQUIEMS ARE SOLEMN." JUDGES VIEW MUSIC AS BEING ALL "EXPRESSION." BUT SOME THINGS ARE STILL TOO BASIC TO BE PROTECTED BY COPYRIGHT.
IF THEY ARE INHERENT TO THE GENRE, OR THEY'VE BECOME STANDARD, THEY'RE CALLED "SCÈNES À FAIRE"--- LIKE COMMONPLACE MOTIFS OR A TYPICAL GUITAR RHYTHM---
MUSIQUE À FAIRE
GENRE
COMMON PLACE
MUSICAL BUILDING BLOCKS
TWIST
CHUNK
SO ROCKERS CAN GO ON USING THE I, IV, V CHORD SEQUENCE?
YES! YOU NEED THEM FOR THE 12 BAR BLUES---
---THAT'S THE HARMONIC STRUCTURE IN TUTTI FRUTTI, HOUND DOG, AND MAYBELLENE!
YOU'LL HAVE MY I, IV, V WHEN YOU TAKE IT FROM MY COLD, DEAD FRETTING HAND.

4.4 HOW DO YOU GET A COPYRIGHT?

Let's assume that you just wrote a new song. Congratulations! As you just read in the comic excerpt, **your work is copyrighted the moment it is "fixed"—saved, recorded, written down**—or, in copyright-speak, "fixed in a tangible medium of expression." You

don't need to register it, or even put a copyright notice on it. However, we will now see why registration is still a good idea.

Benefits of Copyright Registration

Even though you do not have to register your song to have a copyright, you should still register it with the US Copyright Office if you can, for several reasons. First, it lets the public know that you are the person who owns the work. You should also include a copyright notice with your work—"© [date], [your name]"—for the same reason. If someone wants to pay you in order to use your song, they can search the Copyright Office records to find your claim. If you look online, you will see that it is often unclear who to ask for permission; registration makes this easier. Second, if someone uses your song *without* permission, you will need to register it in order to bring a lawsuit. Third, there are extra benefits if you register it quickly. If you register within *three months* of "publication"—publication is a legal term for making the song available to the public—then you are eligible for "statutory damages" and attorney's fees if you bring a successful lawsuit. Statutory damages let you get a monetary award even if you cannot prove the defendant's profits, and attorney's fees let you recoup your legal costs. If you register within *five years* of publication, this becomes evidence in a lawsuit that your copyright is valid. As discussed in the next section, this can be useful because it creates a "presumption" that your work is "original." For more information on how to register your copyright, visit the Copyright Office's website at https://www.copyright.gov/registration/. At the time of writing this book, fees for registration start at $45, and sometimes the paperwork is straightforward enough that you do not need a lawyer. *Rumor alert:* sending a copy of the song to yourself has no legal significance. As the Copyright Office explains: "The practice of sending a copy of your own work to yourself is sometimes called a 'poor man's copyright.' There is no provision in the copyright law regarding any such type of protection, and it is not a substitute for registration."

4.5 WHAT DOES COPYRIGHT COVER?

So, now that you've got a copyright, what do you own? And, as explained in the comic, here is something else you also need to think about…did you use anything that is owned by *someone else*? If so, do you need *their* permission?

The patchwork of what copyright covers (what you own), and what it leaves free (what you don't need permission for), is an important part of how the law promotes creativity. It gives you some control over your song—you get the "exclusive rights" that you have read about (depicted as superpowers in the comic) over your *original, creative expression*. If "The Bachelor" wants to use your song in its next episode, they have to pay you. But copyright also contains exceptions that allow you to create in the first place, because if it covered every note, chord, or word in a song, you would not be able to write music without violating someone else's rights. So if someone copies the basic I–IV–V chord progression from your song, that's fine, because it is not covered by your copyright. You can copy the same I–IV–V progression from anyone else's song too. If "The Bachelor" features your whole song, however, that is a different story. In between, there is a huge gray area. (We will delve

into this gray area by following three famous cases in Chapters Seven and Eight. As you will see, the claim is rarely as simple as a I–IV–V chord progression on the one hand or an entire song on the other.) The comic book explained the basic rules about what is covered and what is not—what did you think? Did anything surprise you?

As mentioned earlier, in this section we are talking about the © copyright over the *musical composition*, and not the ℗ sound recording rights. The composition copyright covers both the *lyrics and music* of your song. The sound recording right covers the recorded *performance* of that composition and is only infringed when someone duplicates the actual sounds fixed in the recording, for example by dubbing it, downloading it, or sampling it. Imitating it does not violate the law. But the composition copyright is broader, prohibiting more than literal copying. Imitation is not the sincerest form of flattery; as you saw on the flow chart, it can be copyright infringement if your song is "substantially similar" to an earlier one. So when there are lawsuits over similar-sounding songs, and no one has copied the particular recording, we are dealing with the composition copyright.

Let's explore what is covered by this copyright in more detail. As you read, keep in mind that terms such as "original" and "idea" and "expression" have special meanings in copyright law that are distinct from their more familiar definitions in plain English. We will begin with a checklist summarizing the rules (Figure 4.3).

Checklist: Is it covered by copyright?

✓ Independently created } = "original"	× Copied from somewhere else
✓ Creative	× Uncreative; merely showing skill or labor
✓ Expression	× Ideas and facts
✓ Not common, trite, necessary for genre/ theme	× Commonplace, basic, necessary for genre/ theme
✓ Fixed in a tangible medium	× Unfixed (such as unrecorded improvisation)

Figure 4.3

Note: when it comes to text (as opposed to music), copyright also does not protect ×titles, names, slogans, or short phrases.[7]

Now let's turn to the nuts and bolts of these categories, followed by an exploration of how music, as an art form, tends to complicate their application.

4.6 ORIGINALITY

Copyright only covers original, creative material. This rule is referred to as the "originality" requirement. It is one of copyright's most important rules—the Supreme Court has called it the "touchstone of copyright protection" and "bedrock principle of copyright." It is actually required by the US Constitution. Remember the "promote the progress" clause from the Constitution that we covered in Chapter Two? As you may recall, it authorized

[7] It is not clear how "short" a phrase needs to be to become categorically uncopyrightable. Courts have sometimes assumed that relatively short phrases are copyrightable (such as Faulkner's line "The past is never dead. It's not even past," which was the subject of a copyright case). In other cases, courts have concluded that short phrases are not copyrightable because they fall into another excluded category, such as not being original. A case discussed later involving the artist 50 Cent provides an example of this.

Congress to give "authors" rights over their "writings." The Supreme Court said that "the crucial terms 'authors' and 'writings'… presuppose a degree of originality." This is because copyright has a particular conception of an "author" as someone who creates their own "original" works, instead of borrowing them from somewhere else.

Importantly, **original does not mean "novel" or "unique." Instead, "original" means, first, that the work originated with the author—that it was "independently created," and not copied from another source.** In theory, even if your melody is identical to another one, it can still be original for copyright purposes as long as you did not copy it from the other song (consciously or subconsciously—we'll get to subconscious copying in Chapter Six). This is part of how copyright tries to deal with inevitable similarities between works—so long as the similarities between your song and others are the result of *coincidence* rather than copying, your work can still be considered original.

To count as original, legally speaking, a work also has to meet another requirement. It must be *creative*. **"Creative" doesn't mean brilliant; it just requires that a work have some minimal degree of creativity**—in the words of the Supreme Court, "the vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." Mere skill, training, or hard work is not enough to make a work creative, though—if you spend weeks painting a perfect replica of a Picasso, or write a great sounding harmony that is entirely dictated by convention, that is not enough to support a copyright. The Supreme Court made clear that labor or "sweat of the brow" is not the predicate for copyright protection: "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"

As you can see from these definitions, copyright is essentially limited to works that spring forth from an author's individual imagination, consistent with its focus on encouraging *creativity*. But, once that requirement is met, the law is quite generous—in theory, you and I can both own the same melody, as long as we came up with it independently, and that melody does not have to be a work of genius, sophisticated, or even listenable.

Now you know how copyright defines originality. That is the first step. The next is applying this definition to music. That can get challenging. As an illustration, let's compare originality determinations for *lyrics* and *music*.

50 Cent, Lizzo, Taylor Swift, and Unoriginal Lyrics…

Let's start with lyrics. **50 Cent** was sued for using the phrase **"Go Shorty, It's Your Birthday"** in his song "In Da Club." The lawsuit claimed he had copied the phrase "Go [insert name here], It's Your Birthday" from another song called "It's Your Birthday," written by Luther Campbell. Campbell is famous for leading the hip hop group "2 Live Crew." You will see the group featured in a "fair use" case in the next chapter. Here, it wasn't Campbell who sued 50 Cent; his copyright had been purchased by a company in a bankruptcy sale, and they were the ones who sued. 50 Cent won the lawsuit, because the court said that "Go _____, It's Your Birthday" was not "original." Why? Because it was a "common hip-hop chant" and "the author of the phrase in question [Campbell] concedes that he borrowed it from his experiences

at hip-hop events and nightclubs." This means that neither 50 Cent nor Campbell owns that phrase.

Lizzo got her famous lyric "I just took a DNA test, turns out I'm 100% that bitch" in her song "Truth Hurts" from this tweet by the British singer Mina Lioness:

Figure 4.4

Lizzo eventually credited Lioness for the line. Because it is not "original" to Lizzo, it is not part of her copyrighted material in "Truth Hurts." But the phrase you see in Figure 4.4 *is* original to Mina Lioness because she came up with it. Note that both "Go _____, It's Your Birthday" and the tweet above come close to being uncopyrightable as short slogans or phrases, but it is not clear whether they fall within that category.

Taylor Swift was sued by two songwriters who claimed that part of the chorus in her song "Shake It Off" infringed the similar lyrics in their song "Playas Gon' Play." Here are the choruses of each song.

Playas Gon' Play
Playas, they gonna play
And haters, they gonna hate
Ballers, they gonna ball
Shot callers, they gonna call
That ain't got nothin' to do
With me and you
That's the way it is
That's the way it is.

Shake It Off
Cause the players gonna play, play, play, play, play
And the haters gonna hate, hate, hate, hate, hate
Baby I'm just gonna shake, shake, shake, shake, shake
Shake it off
Shake it off
Heartbreakers gonna break, break, break, break, break
And the fakers gonna fake, fake, fake, fake, fake
Baby I'm just gonna shake, shake, shake, shake, shake
Shake it off
Shake it off.

In 2018, a district court judge decided that those lyrics were not sufficiently "creative," and therefore lacked "originality." This meant that Swift and any other artist would be free to copy them. Here's what the judge said:

> The concept of actors acting in accordance with their essential nature is not at all creative; it is banal. In the early 2000s, popular culture was adequately suffused with the concepts of players and haters to render the phrases "playas … gonna play" or "haters … gonna hate," standing on their own, no more creative than "runners gonna run," "drummers gonna drum," or "swimmers gonna swim."

Then in 2019 an appeals court reversed this decision and the case returned to the lower court for further proceedings. In December 2021 the lower court refused to rule for Swift and decided that the plaintiffs' copyright claim should go to a jury. Citing to copyright's "famously low bar for originality," the court said that, even if the "playas gonna play" and "haters gonna hate" phrases themselves were not copyrightable, there *could* be originality in the overall four-part *sequence* that used the "playas" and "haters" phrases followed by two other, different

"tautological phrases" where "Xers gonna X." In the plaintiffs' song those phrases are "ballers…gonna ball" and "shot callers…gonna call" while in Swift's song they are "heartbreakers gonna break" and "fakers gonna fake." (We will return to these kinds of copyright claims over combinations of otherwise unprotectable material in Chapter Eight.) Finally in December 2022, shortly before the case was set to go to trial, the lawyers for both sides agreed to dismiss the case. It is not clear what prompted this development or whether there is a settlement.

Should something as basic as using "playas gonna play" and "haters gonna hate" in a set of four tautological phrases be considered original and creative? The use of a tautological phrase by itself is not copyrightable because it is an abstract *idea*—something we are about to discuss—so any originality must lie in stringing the four phrases together. My own view is that this sequence is still banal and unoriginal.

What about originality in music? Instead of the six words "playas gonna play" and "haters gonna hate," what if the claim was over six *notes*? How would you determine whether that *musical* phrase is original?[8] In a lawsuit where the same string of notes appears in two songs, the plaintiff will argue that they own that phrase, and that it is original to them. The defendant will counter that it is *not* original to the plaintiff and bring in other songs with the same pattern as supporting evidence. As we will discuss later in this chapter, because of music's limited vocabulary—there are only seven notes in a major or minor scale, and only certain combinations of them sound good—the same six-note phrase is likely to recur in other songs. How helpful is copyright's *originality* inquiry—which asks whether that sequence of sounds was independently created, and whether it is minimally creative—in these circumstances?

Wait, you might be saying, *six notes*? Yes, copyright lawsuits often involve a claim over a relatively short sequence of pitches. A famous case against John Williams, the composer who wrote the original "Star Wars" music, involved a claim over six notes. The appeals court said the claim was strong enough that they could not rule in favor of Williams and sent it to trial so that a jury could decide. Williams eventually won. For another example, look at the Katy Perry lawsuit in Chapter Eight. There, the two musical phrases in question shared…six pitches, set to a standard rhythm. She lost at trial. Later, that verdict was overturned.

So, how do we decide whether this kind of *music* is original? **It is hard to analyze a fragment of music the way you would analyze a fragment of text.** With lyrics, you can find evidence establishing that "Go ____, It's Your Birthday" is a "common hip hop chant," and connect that phrase to its predecessors. You can read "I did a DNA test and found out I'm 100% that b*tch" and reasonably conclude that when a similar phrase recurs in Lizzo's song, she copied it. It is a memorable formulation that conveys a particular meaning, not an abstract sequence of notes. You could imagine a discussion about whether "playas gonna

[8] In a lawsuit, the originality inquiry is focused on what was allegedly copied—if I don't own those six notes, then you're not infringing my copyright when you use them in your song. Of course, this doesn't mean you don't have a copyright in your overall song, or other "original" parts of the song. You just don't get to prevent others from using those six notes.

play" plus "haters gonna hate" is or is not "creative," taking into account the extent to which those notions permeated popular culture in the early 2000s.

With a musical phrase, the analysis is murkier. Unlike "playas gonna play," the music does not have a particular connotation that makes it intuitively "banal" or uncreative. And, unlike the "common hip hop chant" or the tweet Lizzo copied, the fact that those six notes reappear in other songs doesn't necessarily suggest that the plaintiff *copied* them; the recurrence might just be the product of music's finite vocabulary.

This means that the "originality" determination can come down to whether we think that the plaintiff came up with that particular phrase themselves or copied it from another song. But we don't know what went on in the plaintiff's mind. Maybe she copied it, maybe she didn't. As a result, the "burden of proof"—the rule about who has to prove or disprove originality—sometimes determines the answer. This is where copyright registration can be significant. As discussed earlier, you have to register your copyright in order to sue. If you register within five years of publication, this creates a "presumption" in favor of originality. This presumption puts the burden on the *defendant* to *disprove* originality. To do that, the defendant often needs to convince the court either that the plaintiff actually *copied* from another earlier song with the same musical pattern—rather than independently creating it themselves—or that the similar portion of music is so utterly lacking in creativity that it counts as unoriginal, and thus is not protected by copyright. This is hard to do. As a result, in many music cases, the originality threshold is set very low, perhaps lower than it should be.

In some cases, courts have just assumed that the music in question is original and decided the case on one of the other grounds explored later in this book. That said, there are also cases concluding that basic musical material is *not* original, including a significant set of cases decided since 2020 that involved Led Zeppelin, Katy Perry, Ed Sheeran, and Dua Lipa. These decisions are covered in Chapter Eight. Other cases have said that when music is the product of mere "mechanical skill"—for example, a simple bassline consisting of "a mechanical application of a simple harmonious chord"—it lacks originality. And you will be glad to know that a single note or chord is not original. The "Blurred Lines" case presented in Chapter Seven included a claim over an A7 chord—the judge made clear that "the repetition of a single, common chord" is not original, though many other basic elements did pass the bar.

Many people think there is a rule that "anything under *x* notes or *x* seconds isn't original enough to be copyrightable." But there is no static numerical rule, and what a court decides will depend on the specifics of the case. The Ninth Circuit has said that "a four-note sequence common in the music field"—A, G, F, C—that appeared in at least seven other compositions was not copyrightable, and suggested that three-note fragments are normally unprotectable. In another case involving the three notes C, D-flat, C layered over a background C, though, it assumed for the sake of argument that there was originality and moved on to one of the doctrines lower in the flow chart to decide the case, concluding that copying those notes was legal because it was *de minimis* copying (covered in Chapter Five). And in another case it

left open "the possibility that 'seven notes' could constitute an original expression." But the courts have not laid down an overarching "you can't own *x* notes" rule. At the end of the day, a relatively short passage could still be deemed original if it was independently created by the author and shows a modicum of creativity. People sometimes point to the memorable four notes that begin Beethoven's Fifth Symphony as an example of something that is short, but theoretically copyrightable. Note that even if a short sequence of notes passes the originality bar we are currently discussing, it might still be OK to copy it because it is scènes à faire, discussed below, or because the copying is *de minimis*.

We conclude our discussion of originality with a category of cases that address the question of when *adding* music to an earlier song or riff—for example, by writing a new harmony, or making a new arrangement—meets the requirements for originality. With such "derivative" works, the copyright only extends to the material added, not the preexisting song. So originality becomes an issue because the zone of creative input is narrow. The general rule is that there must be a "distinguishable variation" to the prior work that is more than "merely trivial." Again, this is a low bar. How have the courts ruled? On one side of the line, adding "alto" parts to well-known hymns that already had soprano, tenor, and bass parts, and changing the length of notes in a Russian hymn to match an English translation—referred to as "minor changes which any skilled musician might make"—were deemed unoriginal. On the other side of the line, Billy Strayhorn's harmony for the jazz standard "Satin Doll" was found to be original because "in contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds." And the band ZZ Top's guitar riff in "La Grange," which built on similar riffs in other songs, was sufficiently original because ZZ Top "contributed something more than a merely trivial variation, something recognizably its own to the common idea of a guitar riff."

A final note: we have been discussing the originality of compositions covered by the © right because that is where the issue generally comes up. To be eligible for the ℗ right, the performance fixed in the sound recording must also be original, but there the originality would not be in the composition itself but instead in the way that composition was performed—the way Calandra slides from one note to the next or holds and intensifies the high note or mutters in a breathy voice—so the analysis is slightly different.

4.7 THE IDEA/EXPRESSION DICHOTOMY

Copyright only covers *expression*, not *ideas* or *facts*. This is called the **idea/expression dichotomy** and, like originality, it is a central tenet of copyright law with Constitutional significance. As explained by the Supreme Court, in order to promote creativity, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." This idea/expression dichotomy is one of the two "safety valves" in copyright law that prevent it from unconstitutionally restricting free speech—while copyright is a federal law that forbids others from using your *expression* in their "speech," everyone can freely use your *ideas* and *facts*. If copyright allowed you to

prevent others from using ideas and facts, this would be a First Amendment problem because it would severely curtail their freedom of speech. The second safety valve is "fair use," which will be discussed in the next chapter—fair use allows people to use copyrighted expression in some circumstances. These safety valves are part of how copyright tries to reconcile the copyright owner's exclusive control over their expression with other people's freedom of speech.

As with originality, it is more difficult to apply the idea/expression dichotomy to *music* than to text. You saw an image of ideas and facts jumping out of a book in the comic excerpt: they included "Louisiana Purchase 1803" and "All Men Are Created Equal." No one owns those facts and ideas; thankfully we can all share the concept that "All *People* Are Created Equal," in hopes that one day we might come closer to that ideal. You can identify the facts and ideas from this book—they are yours, to use as you wish. You can probably pick out the ideas in your favorite song lyrics. Returning to those phrases from 50 Cent, Lizzo, and Taylor Swift, perhaps the underlying ideas are something like: party as if it were your birthday; be unapologetic and proud of who you are; annoying people will act in accordance with their essential nature. Even if the "expression" in those lyrics *were* more original, anyone would be free to copy these underlying ideas. But how does one apply this distinction, not to words, but to music? Try it yourself. What are the ideas and facts in the *music* of your favorite song?

Not surprisingly, judges have struggled to pinpoint musical ideas, because, as one judge explained, "music is an art form that 'produces sounds and expresses moods,' but it does not necessarily communicate separately identifiable ideas." It is difficult to characterize a melodic flourish or chord progression or drum riff as an "idea." One court noted that a musical *technique* called an "evaded resolution"[9] *might* be an idea, but nevertheless found that placing the evaded resolution at a particular point in a song could be copyrightable expression. In the end, **music is mostly "expression."** Musical ideas are not readily identifiable. And, as a language, music doesn't convey what we think of as "facts." If we define facts as something you can prove or disprove, then a riff or chord progression isn't the kind of thing you would say is true or false. So *if you think of copyrighted "expression" as private property, and ideas and facts as a public road through that property—that thoroughfare becomes almost nonexistent with music.* Thus one of copyright's key limitations is undermined. This puts more emphasis on the next question—what is too *common* or *necessary* to be protected by copyright?

4.8 SCÈNES À FAIRE

Copyright doesn't cover common and trite material, and elements that are necessary for creating within a genre. This is called scènes à faire—French for "scenes that must be done," in the sense of being obligatory if one is doing that kind of art. Scènes à faire therefore refers to the defining elements of a genre or style, or the plot elements naturally associated with a particular subject. For example, in movies, courts have explained that

[9] As defined by the court, this is where a chord doesn't "resolve" or "lead" to the expected next chord.

"parties, alcohol, co-eds, and wild behavior are natural elements in a story about a college fraternity," and "elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx." Good to know! Courts do not always use the term "scènes à faire"; they have also described these elements as too "common," "trite," "stereotypical," "clichéd," "stock," or "hackneyed" to be protectable. Whatever the terminology, anyone can use this material without infringing copyright—*even if it would otherwise qualify as original, creative expression*—because it has become *standard*.

What are some examples of scènes à faire in song *lyrics*? With lyrics, the question is often about what kinds of things are indispensable or inherent when dealing with a particular theme. You have already read one quote about country-western songs in the comic excerpt: if you are writing about a broken-hearted lover seeking solace in country music, you get to include a barroom with a jukebox. Here is another one: "in any country song discussing the past and future 'good old days,' the subjects of drinking, socializing, and courting are clearly scènes à faire." And here are two other examples.

Jamie Foxx, Beyoncé, and scènes à faire in lyrics…

Jamie Foxx successfully argued that the lyrics in his song "Heaven" did not infringe those in a song called "One of God's Angels is AWOL" because the similarities were all scènes à faire for a song about "an angel leaving heaven to come to earth"—they included the angel having unfinished business and being "amazing," the singer being elated, and heaven having a "big problem." On the other hand, Destiny's Child, Beyoncé's former group, was unsuccessful when it argued that the following were scènes à faire for songs about "relieving the stress from [a] significant other and getting them to relax": "the significant other feeling stressed because of work, preparing a hot bath for the significant other, massaging the significant other, and the interaction between the lovers in bed." Both songs were called "Cater 2 U," but song titles themselves are not copyrightable. Do you think these cases are consistent with one another?

So, turning to music, what about **musique à faire**? Is that six-note phrase a distinctive hook, or just a rote *motif*? Given the low bar for originality and the rarity of musical ideas, is scènes à faire more helpful than originality or the idea/expression dichotomy in telling us what *musical* elements can be owned, and what is free to use without fear of a lawsuit? It is certainly a promising option—it is consistent with the reality that many songs sound similar because they are building on a limited vocabulary and conforming to formulaic aspects of a genre. The more something appears, the more likely it will become standard.

Here are some examples from cases of musical scènes à faire. In "pop rock": the key of A major, a I–IV chord progression, chords in root position, and an acoustic guitar introduction. In country-western music: a two-step, a "chord progression and rhythmic feel…used in thousands of other songs," a descending melodic line in the hook, and the verse-chorus-verse-chorus form. In pop: a descending scale step phrase in the verse, a recurring eighth note rhythm, and a harmonic progression and structural patterns "found in many other

well-known songs." Some cases have said that musical "motifs"—short phrases—are scènes à faire, while others have not.

Notice how basic and general many of these are. We do not have specific menus of musique à faire, so that any musician would know what elements are fair game within a given genre. (It would be great if a group of music experts would create one, although, even then, courts might not give it authoritative weight.) For music, scènes à faire *could* help to ensure that all musicians can build on a "commons" of stock elements. But so far it has been underdeveloped. Why?[10] The very idea of "genre," of course, is a construct, and genre boundaries are fluid. And within a given genre, it is not clear *when* something becomes so common that you cannot own it—when it appears in ten other songs? Twenty? And does the music in question—say, a typical reggae rhythm or hard rock bassline—have to be *identical* to what appears in those ten other songs to be considered scènes à faire? Courts have not resolved these questions. As with originality, the burden of proof can be on the defendant to navigate this murky territory and prove that the relevant music is an unprotectable stock element in the genre, and that there is therefore no copyright infringement. Many defendants cannot meet this burden, so the number of cases finding particular features to be scènes à faire is smaller than you might think.

Now you know a lot more about what copyright includes and what it excludes. Notice that all of these choices are made in order to "promote the progress." **The yin-yang of control and freedom is designed to foster *creativity*: you control enough to provide you with incentives to create, but you also are free to use raw materials you need to create in the first place. *The boundaries of the property right are informed by the goals of the system.*** Notice also that applying the key tests that determine what is owned and what is not—originality, idea/expression, scènes à faire—to *music* is not always a natural task.

4.9 WHAT ARE YOUR EXCLUSIVE RIGHTS?

We have already discussed copyright's exclusive rights, and their evolution, in Chapter Two, where we also explored how their practical reach is expanded in the world of the internet. To review, here are Anita's exclusive rights over the copyrighted material in her ***composition*** (Figure 4.5). As we have discussed, to infringe Anita's copyright, I do not need to make an exact "reproduction" of her song, my music only needs to be "substantially similar" to hers.

[10] It bears noting that in the vast majority of music copyright cases, the plaintiff and defendant reach a private agreement before the judge issues an official opinion. So we only have a limited sample composed of the court opinions that went the distance, which generally involve two parties who have the resources necessary to litigate a case and who believe that they can win at trial and thus are unwilling to settle.

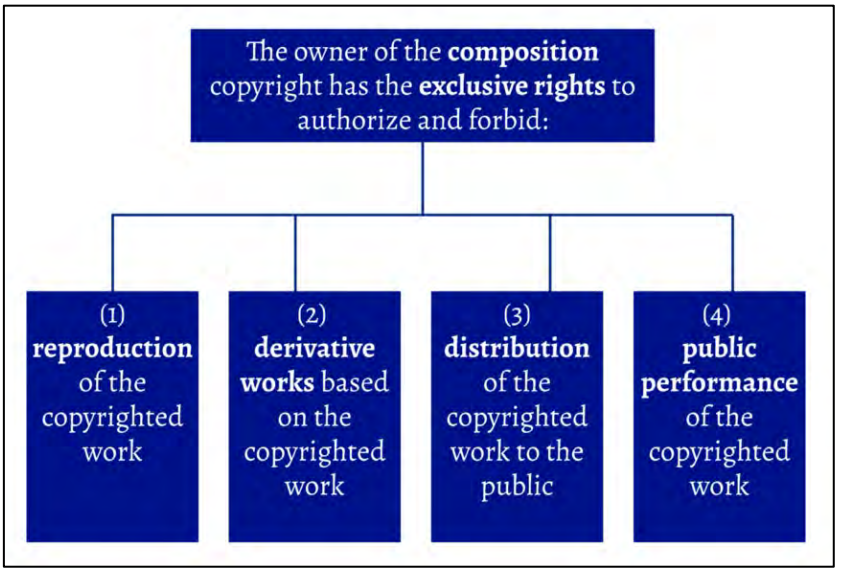

The owner of the **composition** copyright has the **exclusive rights** to authorize and forbid:
(1) **reproduction** of the copyrighted work
(2) **derivative works** based on the copyrighted work
(3) **distribution** of the copyrighted work to the public
(4) **public performance** of the copyrighted work

Figure 4.5

Quoting from the Copyright Act, the rights are:

(1) to **reproduce** the copyrighted work in copies or phonorecords;

(2) to **prepare derivative works** based upon the copyrighted work;

(3) to **distribute** copies or phonorecords of the copyrighted work to the public;

(4) to **perform** the copyrighted work **publicly**.

Copyright also includes the right to **publicly "display"** copyrighted works, but this applies less to music than to works such as photographs and paintings. In Chapter Eleven, we will look at these different rights in more detail, and at the different royalty schemes that are attached to them.

To review, as a performer Calandra's ***sound recording*** rights are more limited than the rights of a composer. She has the rights to **reproduce**, **distribute**, and **prepare derivative works** of her recording. Remember that those rights only extend to literal copying of the recording. Imitating her performance does not infringe her rights, though it might infringe the underlying rights of the composer. She does not have a general public performance right, but she does have an exclusive right "to perform the copyrighted work publicly by means of a **digital audio transmission**."

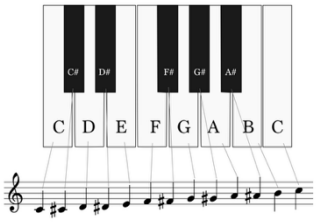
4.10 THERE'S SOMETHING ABOUT MUSIC...

As you may have noticed, music is hard for copyright law to handle. Copyright's assumptions and rules, developed with books in mind, don't quite…fit. Applying them to music is like trying to fit the square peg into the round hole. (It turns out that your friend who was appointed the literature czar in Musicland may have had an easier task than you.) Note that music is not the only art form that presents these kinds of challenges. Over the years, copyright has added a lot of "subject matter"—photography, architectural works, choreography, and even software—without recalibrating its rules to reflect the nature of the

art form. When the rules do not make sense, it has been up to courts to tweak copyright's internal settings. As you will see, they are still in the process of doing that for music.

In this chapter, we have seen how copyright's apparatus for sifting what is protectable from what is not is difficult to apply to music. Part of this is because the music, as opposed to the lyrics, does not contain readily identifiable facts and ideas, or readily ascertainable meaning. Part of this is because of the "burdens of proof" and other features of the way lawsuits are decided. Part of this is because of the likelihood that the same musical elements will appear in multiple pieces—this not only muddles the notion of "originality," but, as you will see in the next chapter, it also complicates the infringement inquiry. When are these similarities illegal? And when are they OK?

With a book, copyright's assumption is that we can all "independently create" our own original expression. If each person in your class is writing a novel about Freshman year, you will probably echo some facts, some ideas, some "scènes à faire." Under the law, those are fair game. But what are the odds that two of you coincidentally write exactly the same sentences, word for word? Probably pretty low.



Chromatic scale (Figure 4.6)

Music is different. Estimates are that there are around 170,000 English words in current circulation, with most native English-speaking adults knowing between 20,000 and 35,000 words. With music, there are only twelve notes on the Western chromatic scale (shown in Figure 4.6 represented by the black and white keys on a piano, before you reach the next octave), and seven notes on a major or minor scale (a major scale is shown in Figure 4.7). While you could make many *combinations* of those notes, if you want a melody or accompaniment to *sound good*, your choices are more limited.

C major scale (Figure 4.7)

To quote a famous judge named Learned Hand: "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing…**Recurrence is therefore not an inevitable badge of plagiarism**." There are only so many musical moves that *work* and satisfy listener expectations. The same is true of harmonies and rhythms. Add to this the conventions of a given genre or style, and many songs inevitably sound similar. Of course, when considered as a whole, songs will still be different, but copyright lawsuits often focus on the kinds of isolated features that are likely to recur in multiple songs.

"You can find a doppelganger for almost any tune."

–Duke music professor Dr. Anthony Kelley

So, if everyone in your class writes a *song* about Freshman year, similar sequences of notes may easily appear in multiple different songs, not to mention rhythms and harmonies. This is even more likely if they are all within a particular genre, such as reggae. Even though many copyright cases focus on melodic similarities as evidence of copying, forensic

musicologist and Berklee Professor Joe Bennett explains that coincidence is especially likely to occur with melodies. Not only are there a limited number of euphonious choices in moving from one pitch to the next, those choices are driven by musical context, lyrical phrasing, and the dictates of playing a particular instrument or singing.

Today, there may be additional factors driving musical similarities. Producers are increasingly using big data and predictive analytics to generate new songs that are likely to be hits. This means that the next successful song may share a lot of features with prior ones. Also, songs are being constructed from more than just notes; now it is common practice to use prefabricated stems, loops, and sample packs. (We will discuss such developments in Chapter Ten.) If they are licensed, there is no infringement. But it still means that going forward, we may find even more musical convergence.

The "Birthday Paradox"

Accusations of copyright infringement often turn on the question of whether a portion of one song is similar a portion of another and, in particular, whether it is likely that the second artist happened on that musical fragment serendipitously. Expert witnesses are frequently employed by plaintiffs to argue that such similarities could not have come about without copying. They make a pairwise comparison between the plaintiff's and defendant's songs and say that the odds of coincidental similarity are unlikely. But is this the right way to think about it? My colleague and husband James Boyle has pointed out that probability theory's "birthday paradox" shows there is a flaw in the logic.

If there are 23 people in your class, what is the probability that any two of you have the same birthday? You might think it is pretty low. But the birthday paradox tells us that if there are 23 people in a room, there is a 50 percent probability that two have the same birthday. If there are 70 people in a room, that probability goes up to 99.9 percent. Why? Because the question is not whether one particular person has the same birthday as a particular other person in the room. The question is whether a *pair* of any two people has the same birthday. With 23 people, there are *253* possible pairings ($23 \times 22/2$).

When we discuss famous copyright lawsuits in subsequent chapters, you will see that they involve claims over musical fragments such as short note sequences, harmonic progressions, and rhythmic patterns. If you think of a song as a mosaic, the odds that each fragment matches something from *any* other song are incredibly high, and they increase exponentially as the universe of songs grows larger. The question is not just whether there are similarities between song X and song Y. It is whether the musical components that make up song X recur somewhere in the universe of songs A through Z. Sure, that bit of the defendant's song might sound like that bit of the plaintiff's, but what if the defendant had made some other musical choice? In that case, she could have potentially sounded like *another* song, whose owner might then sue her instead. To sum up, *when people tell you that similarities are extremely unlikely to have occurred by accident, remember the birthday paradox*. Of course, if the similarities are extensive or they are unusual, intricate, or complex, this might make coincidence less likely—the next chapter will look at the kind of evidence that is used to determine whether similarities resulted from copying or coincidence.

Now add to all of this the long and accepted tradition of *borrowing* in music that we discussed in Chapter Two. What we were discussing previously were *coincidental* similarities, driven by music's limited vocabulary and the dictates of genre. With borrowing, the similarities are *deliberate*. Musicians are building upon their inspirations, giving a nod to their predecessors. Study a great musical tradition, and you can trace its myriad influences, trying to find the musical source of the Nile.

"We're running out of melodies"

This was the concern that drove a musician, lawyer, and technologist named Damien Riehl and his colleague, a coder named Noah Rubin, to generate "every melody that has ever existed and ever can exist," in order to dedicate them to the public domain, so people could no longer be sued for infringing them. In a TED Talk about this project, Riehl begins: "Maybe since the beginning of time, the number of melodies is remarkably finite. Maybe there are only so many melodies in this world." In order to write a song anew, he explains: "You have to avoid every song that has ever been written. Because if you don't avoid those songs, you get sued…You've just stepped on a melodic landmine." There are "only so many notes that can be arranged in so many ways." Riehl and Rubin created an algorithm that generated all possible 8-note, 12-beat melodies, and put that dataset online. They have since expanded the project.

While ambitious, this project will not insulate everyone from future lawsuits. If a plaintiff sues me for copying their melody, I would have to argue either that they copied their melody *from Riehl's public domain dataset* and it is therefore unoriginal, or that I actually copied my melody from that dataset instead of from her. Both would be hard to prove, because it is very unlikely that we did. Can you imagine many songwriters doing so? I could also argue that the presence of the same sequence of pitches throughout the dataset renders it too commonplace to be owned, but courts may be reluctant to reach this conclusion based on the dataset alone. Chapter Eight will shed additional light on what kinds of evidence courts find persuasive when deciding whether musical material is protectable.

4.11 WHAT IS MUSIC?

As you learned in Chapter Two, with intellectual property, the boundaries of the property right are not always clear. **With music, not only are the boundaries of the *property right* unclear, but so are the boundaries of the *music* itself.**

As we have discussed, music was brought within copyright's ambit by analogy to books. In the United Kingdom, music became eligible for copyright because it was a "written" mode of conveying ideas, if in the form of "signs and marks" rather than words. In the United States, too, copyright law focused on music in written form. The copyright holder's *market* was for sheet music, and the exclusive rights reflected that fact: they covered printing, reprinting, publishing, and vending. This made sense at the time, because music was "fixed" in paper form.

Copyright law held on to this mode of fixation for a *long* time. Until 1978, when our current copyright law went into effect, the Copyright Office only accepted sheet music when

you registered copyright in a composition, even though compositions had been "fixed" on audio formats—all of those mechanical reproductions we learned about in Chapter Three—for decades. Now you can send in a *recording* instead of sheet music, and that is how most musicians submit their songs.

Thinking about music as a "writing" can be misleading, however. With a book or a painting, we can look at the words on the page or paint on the canvas and have some sense of what the work of art consists of, even though we may disagree about nuances like what is implied or how to interpret that content. But **music is, first and foremost, something you *hear*. Yet, for most of copyright's history, the musical work has been defined by what you *see***. The problem with this is that notation is an imperfect representation of *sound*. Think of the noise that Wile E. Coyote makes when he falls through the air in a Road Runner cartoon: how do you notate that?

> Music is the only language with the contradictory attributes of being at once intelligible and untranslatable.
> –Claude Lévi-Strauss

Particle or Wave? "Yes." Like light, which can be described as both a particle and a wave, music has an inherent duality. It is something you see, as musical notation, and something you hear. What you hear—those sound waves that cause vibrations on your eardrums that are then interpreted by your brain—that's the music, the "signified." (Photo 4.1) The "signifier" is the visual depiction of that sound.

Photo 4.1 by Elli Gerra, made available under a CC0 public domain

Take the pitch for "A" above the middle C. According to the current "concert pitch" used for tuning instruments, its audio frequency is 440 Hz (Figure 4.8). Google 440 Hz and listen to what that note sounds like. Moving from auditory to visual, Figure 4.9 shows what it looks like in notation, and Figure 4.10 shows it on a piano keyboard, indicated by the right arrow.

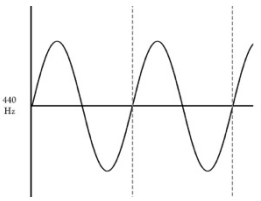


Figure 4.8

Figure 4.9

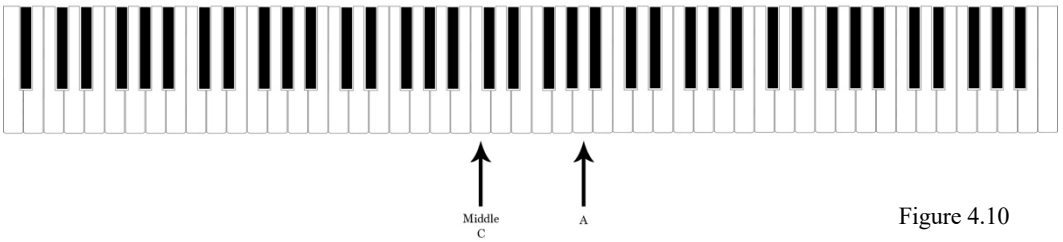


Figure 4.10

Now here is the way it is often represented in a lawsuit: with a number. Because judges and juries do not generally read music, pitches are frequently indicated simply by their scale degrees, where 1 through 7 would correspond to Do, Re, Mi, Fa, Sol, La, and Ti on a Western

scale. Numerically, A would be "1" on an A scale ("Do") and "6" on a C scale ("La"). We will see examples of these kinds of visualizations later in this book.

For copyright, the question "What is music?" is tethered to the property right, and what you "own." The answer to "What do you own?" used to be "What's on the manuscript." Then, since sound recording rights were added in 1972, the ownership of what you "hear" in a recording has been separated into the "composition" covered by the © copyright, and the "sound recording" covered by the ℗ copyright.

Against this backdrop, the threshold question in copyright cases of what a composition consists of is not always easy to answer. Historically, courts focused on some combination of melody, harmony, and rhythm, because that is what was written down. Now the scope of a musical composition is more of an open question. An influential case called *Swirsky v. Carey* ("Carey" is Mariah Carey), left the question *very* open. It stated:

> In analyzing musical compositions under the extrinsic test, we have never announced a uniform set of factors to be used. We will not do so now. Music, like software programs and art objects, is not capable of ready classification into only five or six constituent elements; music *is comprised of a large array of elements, some combination of which is protectable by copyright*.

The court then listed an impressively "large array of elements," derived from other cases and from commentators. In addition to melody, harmony, and rhythm, it offered the following possible components of a composition: a title hook phrase, shifted cadence, instrumental figures, verse/chorus relationship, fade ending, pitch, tempo, phrasing, structure, chord progressions, idea, phraseology, melodic contours, structures, meter, instrumentation timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, basslines, and new technological sounds. (Kitchen sink optional.) Most of these elements are not copyrightable standing alone, but as the court indicated, some combination of them *might* be protectable. We will discuss copyrightable combinations in Chapters Seven and Eight.

Within that range of possibilities, there is a lot of wiggle room. When Anita writes a new song and Calandra records it, how do we know what is part of Anita's "work"? If there is sheet music, we could look at the manuscript for guidance, but as mentioned, it is an inexact representation. Or we could decide that Anita's composition *ends* where Calandra's performance *begins*, but it is not clear where that demarcation lies.

Consider the following two examples.

1) The music is fixed on paper.

James Newton is a talented flutist, and both the composer and performer of a song called "Choir." The Beastie Boys sampled six seconds from the beginning of the song. Because this was a sample and they copied directly from the sound recording, they needed to think about both the composition and sound recording rights. They licensed the rights to the *sound recording*, but not the composition; perhaps they thought—accurately, as it turned out—that the law did not require licensing the latter. Newton no longer owned his sound recording

rights because he had sold them to ECM Records. So Newton sued the Beastie Boys for copying his underlying musical *composition*, to which he still had the rights. Therefore, the central question in the case was: what aspects of those six seconds were part of the composition, and what were part of the performance?

Figure 4.11 shows his sheet music for the song. Take a look, and then listen to the audio.

Figure 4.11

Listen to the songs

As you can see, there are only a few *notes* on the score: a three-note sequence over a held background note. However, there are other instructions on the page. The three notes are supposed to be "sung" into the flute while the held note is to be "fingered," and the asterisk at the bottom explains "This piece requires singing into the flute + fingering simultaneously." This is an advanced technique called "vocalization." The little circles above the "fingered" note indicate that the performer should overblow, which creates harmonics. "Senza misura" means "in free time" and "largo" means "very slow."

If you listen to the audio, you will hear a lot more than four notes: there are "multiphonics," or multiple pitches, that come from the singing and overblowing. Are those part of the composition or performance?

In its opinion, the court began by explaining that "sound recordings and their underlying musical compositions are separate works with their own distinct copyrights." What falls into each category? As described by the court: "A musical composition captures an artist's music

in written form. A musical composition's copyright protects the generic sound that would necessarily result from any performance of the piece." By comparison: "The sound recording is the aggregation of sounds captured in the recording…the sound recording is the sound produced by the performer's rendition of the musical work."

Applying these definitions, the court limited what Newton owned as a composer to the notes on the sheet music. The additional sounds—the multiphonics, portamento (gliding between notes), timbre (the quality of the sound beyond its pitch and volume)—were part of Newton's masterful performance. Newton's own expert witnesses did not help him here, as they kept emphasizing his impressive *performance* technique. For Newton, since he had sold the rights that covered his performance, all he was left with were a few notes, and the court ruled in favor of the Beastie Boys because their use was what the law calls "de minimis." You will see this case featured in the next chapter when we discuss the *de minimis* doctrine.

From looking at the sheet music and listening to the performance, what do you think is part of the "composition" versus "performance"? What if, when any flutist follows the full instructions on the score, assuming they had the skill to do so, they would produce similar sounds to Newton's? When a composition is fixed on paper, it is easier to find a black-and-white demarcation, but this may or may not be fair to the composer.

What happens where there is no score? Compare Newton's case with the next example.

2) The music is embedded in a sound recording

A company called Bridgeport Music bought up the rights to a huge catalog of songs, including George Clinton's funk classic "Atomic Dog." Bridgeport then sued around 800 defendants for copyright infringement. One of those cases yielded a controversial decision saying that sampling anything more than one note requires a license. We'll get to that in Chapter Nine. Another of Bridgeport's lawsuits was against Public Announcement, an R&B and hip hop group, who had echoed the phrase "Bow wow wow, yippie yo, yippie yea" at the end of a song called "D.O.G. in Me," and also used two other elements from "Atomic Dog": the word "dog" said in a low tone of voice at regular intervals, and the sound of rhythmic panting. A jury decided this was copyright infringement.

As with the previous case, only the *composition* copyright was at issue here, because that is what Bridgeport owned. While "Bow wow wow, yippie yo, yippie yea" was clearly part of the composition's lyrics, what about the word "dog," and what about the panting? Were they part of the *composition*, or the *performance*? Should copying those count as infringement, in two songs about…dogs?

"Atomic Dog" was created without a written score. Clinton's fellow songwriters recalled that "when George arrived he had been partying pretty heavily so he was, you know, feeling pretty good," and, because he was not steady at the microphone, they "got on either side of him. We just kind of kept him in front of the microphone." This songwriting process was very different from sitting down with a quill pen to "compose," but it brought us one of the best funk songs of all time. Eventually sheet music to "Atomic Dog" was produced, and it did not include the repeated "dog" refrain or the panting. However, this sheet music was created after the song was recorded, and the court decided that because the song was

"composed and recorded in the studio simultaneously," the composition was "embedded" in the recording. It concluded that the word "dog" and the panting were part of the *composition* because "dog" was "a stand-alone melody of one word" used as "musical punctuation," and the panting "followed the rhythm of the song."

So there you have it: Newton's multiphonics were performance and not composition, but Clinton's low-voiced "dog" and panting were composition and not performance. In the first case, the score provided a dividing line, and in the second, the recording allowed for a broader scope. The scope of a composition was affected by whether it happened to be fixed on a manuscript or a recording. These are just two examples, of course—some courts read more into the sheet music, and others filter compositional and performance elements differently.

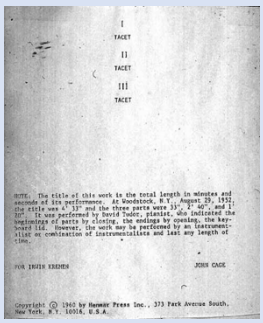
Suffice it to say that as a general matter, courts have struggled to find a principled way to delineate the contours of a musical composition. Is it what you see? What you hear? Sometimes a manuscript indicates "what it *is*." Sometimes the ℗ rights indicate "what it is *not.*" But both the written form and the composer/performer divide—where a "composer" pens a score that is then recorded by a "performer"—are **relics from copyright's evolution**. They do not necessarily reflect how music gets created today, or, as we have discussed, how music was ever created in oral and non-Western traditions. When songs are captured directly in recordings, composition and performance elements are merged. The music contains the contributions of songwriters, performers, producers, sound engineers, and even machines: a lot of the sounds you hear are the product of digital manipulation—effects, mixing, the dreaded autotune. From this mélange, how do we extract what's part of the composition, and distinguish it from what's part of the sound recording? With a sonic art form, "what it *is,* is not exactly clear." Copyright law grew up in a different world than the one you inhabit, and its framework may seem increasingly anachronistic when hits are crafted with digital audio workstations and prefabricated sounds and more and more components are being made with artificial intelligence (covered in Chapter Twelve).

In this chapter we have looked at several filters that determine what can and cannot be owned as exclusive property. Originality, idea/expression, and scènes à faire all relate directly to copyright's *purpose*. In order to "promote the progress," the law allows authors to own their original, creative expression, but ensures that ideas, facts, and scènes à faire remain free for others to use. These filters are animated by the goals of the system. But other filters are more arbitrary and historically contingent. When the elusive boundary between the © and ℗ rights is used to define the scope of the musical composition, this is not a way of furthering a chosen goal of the system. Instead, we are superimposing an artifact from how the law developed upon an issue that it was not built to address. The question of what *should* be part of the composition—whether Newton's should include the multiphonics or Clinton's should include the rhythmic panting—remains unresolved. Some scholars have proposed jettisoning the ©/℗ framework entirely,[11] but with entire industries built on top of that history, this is unlikely.

[11] See Robert Brauneis, "Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance" (2014).

Silence

For an example where the "fixation" and the "work" truly diverge, consider avant-garde composer John Cage's famous art piece entitled 4'33." For four minutes and thirty-three seconds, the performers sit on stage, and no one plays anything. The work consists of the ambient noise and individual audience experiences that occur during that time period—someone might cough, someone might adjust their chair, a bird might chirp outside, you might create your own soundtrack in the theater of your mind.


I
TACET
II
TACET
III
TACET

NOTE. The title of this work is the total length in minutes and seconds of its performance. At Woodstock, N.Y., August 29, 1952, the title was 4' 33" and the three parts were 1', 2' 40", and 1' 20". It was performed by David Tudor, pianist, who indicated the beginnings of parts by closing, the endings by opening, the keyboard lid. However, the work may be performed by an instrumentalist or combination of instrumentalists and last any length of time.

FOR IRVIN KERMES JOHN CAGE

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Here is Cage's written score. So, what does he own? Under copyright law, it is the "expression" on this written page. But the evanescent ambient noise of each performance is unfixed and uncopyrighted. So is the underlying "idea" of a silent piece.

Fun facts!

1) "Tacet" means "is silent" in Latin.

2) If you add up the seconds in 4'33" you will get 273 seconds. Does the number 273 sound familiar? Negative 273 degrees Celsius is the temperature called "absolute zero," where particles stop moving. Talk about silence.

3) The composer Mike Batt "wrote" a silent piece called "A One Minute Silence," and in a hoax, said that John Cage's estate sued him for it. Batt eventually acknowledged: "There was no court case, no serious litigation. Just a lot of fun between us and lots of press coverage. But let's get this straight: John's silence was inferior to mine. My silence was digital and his was analogue. Also, mine was not played by an eight-piece band and his was not played by a solo clarinet." If this lawsuit were real, would it succeed? Probably not! A "silent" song is the kind of "idea" that copyright doesn't cover.

SUMMARY

In this chapter, we have explored what "I own this" means in the context of music. We looked at the legal framework for deciding what kinds of musical elements can be owned, and at some of the challenges involved in applying this framework to music. We discussed the metaphysical question of what music even is, and the difficulty of sifting out what is covered by the different composition and sound recording copyrights. A flow chart laid out the steps for showing copyright infringement. Chapter Four has focused on the first part of that chart—"What's covered by the copyright?" In Chapter Five, we will turn to the next question on the chart: "Was that copyrighted material infringed?" Now that we've figured out what I own, how do we decide whether "you stole it"?

5
Musical Echoes

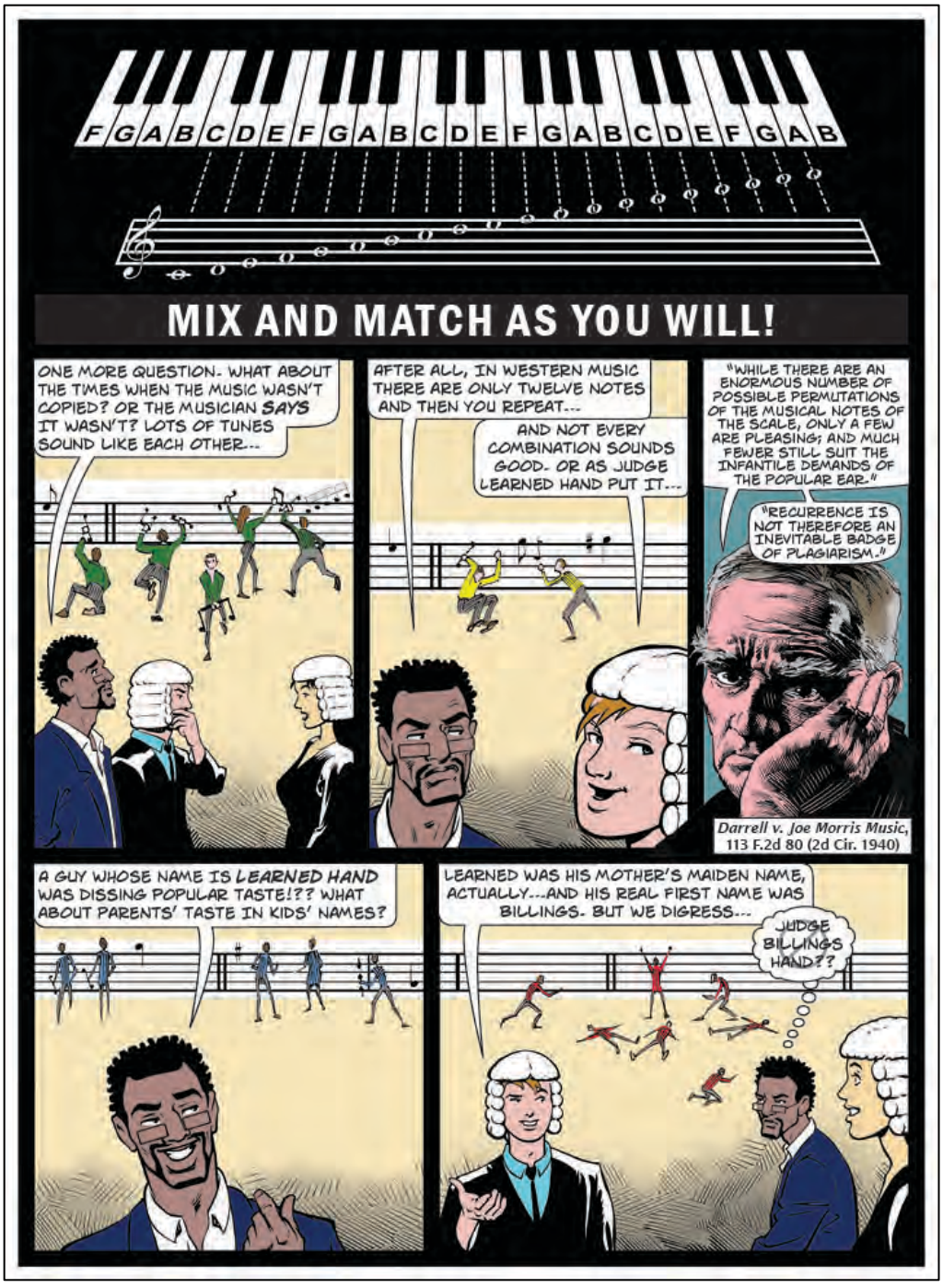
Inside this chapter

5.1 COINCIDENCE OR COPYING? 119
5.2 INSPIRATION OR THEFT? 127
5.3 FAIR USE 133

In the previous chapter, we discussed *owning* music, and some of the reasons why it is difficult to apply copyright's doctrines to music as an art form. We now turn to the question of copyright *infringement*. We have already discussed why many songs will sound similar. Maybe two songwriters happen upon the same "pleasing" collocation of notes. Maybe two artists working within the same genre use the same conventions. Maybe an artist wants to give a shout out to their heroes. When do musical similarities cross the line into being *illegal*? In this chapter, we will explore the mechanics of how courts go about answering this question. How do we draw the line between coincidence and copying, and between permissible inspiration and impermissible theft? How do judges and juries, who often do not have musical training, analyze musical similarities, distinguishing between unprotected material such as common themes in a genre, and portions of original expression illegally taken by one artist from another? When is it *legal* to use copyrighted music because it is considered a "fair use"?

5.1 COINCIDENCE OR COPYING?

Let's start with a common scenario: a plaintiff says, "You copied my music!" And the defendant says, "Did not! I wrote my song myself!"—and, sometimes, "Besides, I've never heard your song in my life!" This is different from the kind of musical borrowing we discussed in Chapter Two, where the copying was deliberate and, until relatively recently, accepted. What if the similarities between two songs are a coincidence? Let's hear from our comic book characters.


F G A B C D E F G A B C D E F G A B C D E F G A B
MIX AND MATCH AS YOU WILL!
ONE MORE QUESTION. WHAT ABOUT THE TIMES WHEN THE MUSIC WASN'T COPIED? OR THE MUSICIAN SAYS IT WASN'T? LOTS OF TUNES SOUND LIKE EACH OTHER...
AFTER ALL, IN WESTERN MUSIC THERE ARE ONLY TWELVE NOTES AND THEN YOU REPEAT...
AND NOT EVERY COMBINATION SOUNDS GOOD. OR AS JUDGE LEARNED HAND PUT IT...
"WHILE THERE ARE AN ENORMOUS NUMBER OF POSSIBLE PERMUTATIONS OF THE MUSICAL NOTES OF THE SCALE, ONLY A FEW ARE PLEASING; AND MUCH FEWER STILL SUIT THE INFANTILE DEMANDS OF THE POPULAR EAR."
"RECURRENCE IS NOT THEREFORE AN INEVITABLE BADGE OF PLAGIARISM."
Darrell v. Joe Morris Music, 113 F.2d 80 (2d Cir. 1940)
A GUY WHOSE NAME IS LEARNED HAND WAS DISSING POPULAR TASTE!?? WHAT ABOUT PARENTS' TASTE IN KIDS' NAMES?
LEARNED WAS HIS MOTHER'S MAIDEN NAME, ACTUALLY...AND HIS REAL FIRST NAME WAS BILLINGS. BUT WE DIGRESS...
JUDGE BILLINGS HAND??

SO WHAT HAPPENS WHEN THE MUSICIAN CREATES THE MELODY HIMSELF? THAT'S NOT COPYRIGHT INFRINGEMENT, RIGHT? EVEN IF THE TUNES ARE IDENTICAL?
RIGHT – LAWYERS CALL THAT "INDEPENDENT CREATION" AND IT'S A DEFENSE.
MY MASTERPIECE!
BUT HOW DO YOU PROVE YOU DIDN'T COPY SOMEONE ELSE'S TUNE?
THAT TURNS OUT TO BE HARD...BASICALLY THE COURTS LOOK TO WHETHER YOU HAD ACCESS TO THE OTHER PERSON'S SONG, AND WHETHER THE SIMILARITIES WERE THE RESULT OF COINCIDENCE OR COPYING.
IF IT SEEMS LIKE YOU COPIED, THEY THEN LOOK AT WHETHER YOUR SONG IS "SUBSTANTIALLY SIMILAR."

The comic book characters have reminded us of music's limited vocabulary, and you got to hear from Judge Learned Hand again, but now you know his real name! Let's pick up on the inquiries outlined at the end of the excerpt. The first thing courts look at is whether you had access to the other person's song, and whether the similarities were the result of coincidence or copying.

We will call this the "factual copying" inquiry. This is different from the question of whether the copying is *illegal*—we will get to that in a moment. Right now, the question is: did the defendant copy from the plaintiff's song *at all*? Or did they independently create their own work? It is easily resolved if the defendant *admits* to copying, or there is a digital fingerprint showing copying, as with a digital sample. But here the defendant says they came up with their song themselves. When there is no *direct* evidence of copying, we have to turn to *circumstantial* evidence. We can't know the answer for sure, so we have to make inferences and assumptions. Because you can "find a doppelganger for almost any tune," coincidences happen a lot in music. Then again, copying is certainly possible. What we conclude will depend on the specific facts of a particular dispute. Lawyers call this a "fact-specific" inquiry, meaning that every case will be different, so it is hard to offer generalizations.

The initial questions for "factual copying" are whether the defendant had **access** to the plaintiff's work and whether there is "probative similarity" between the works—these are the kinds of similarities that suggest that copying occurred. Access is important because if the defendant never heard the plaintiff 's song, they could not have copied it. This is where the "besides, I've never heard your song in my life!" argument comes in. If you have been living in a hermetically sealed environment, with no internet, you could credibly claim a lack of access to other music. But this is unlikely. It is time to return to the flow chart from Chapter Four, where we are moving on from the "subject matter" of copyright to the next step: the basic rules for "access."

Factual Copying

Did the defendant have ACCESS to the plaintiff's song? *If there is direct evidence of copying, as with a sample, skip this step since factual copying is already established.*

"Access" means that the defendant had a "reasonable opportunity" to copy the plaintiff's work. It does not require evidence that the defendant actually heard the plaintiff's song, and can be shown if 1) plaintiff's song was widely distributed, or 2) even if it wasn't popular, if there is a chain of events linking the plaintiff and defendant. There should also be similarities "probative" of copying.

If the songs are STRIKINGLY SIMILAR, sometimes access is presumed.

Notice that the plaintiff does not have to prove that the defendant *actually* heard the plaintiff's song, only that they had a "reasonable opportunity" to copy it. Put another way, there needs to be a "reasonable possibility" that the defendant could have heard the song. However, a "bare possibility" that they encountered it is not enough. As you will see, this is still a pretty low threshold—we all have a reasonable opportunity to hear lots of music. This level of "access" can be established in two ways: 1) when the plaintiff's song was widely disseminated, or 2) even if the song was relatively unknown, through a chain of events connecting the plaintiff and defendant.

The theory behind **widespread dissemination** is that if a song is "out there" and sufficiently popular, then we can assume that you *might* have encountered it. As you will see when we get to the Michael Bolton lawsuit, in actual cases, courts sometimes accept far-fetched evidence on this point. Bolton was found guilty of *subconsciously* copying a song

that *may*—or may not, there was no proof either way—have played on the radio where he was growing up, 24 years before he wrote his own song. And when we get to the Katy Perry case, we will discuss the fascinating and unresolved question of what widespread dissemination means *today*, when there is ubiquitous availability of music on streaming and video services. If a song has a certain number of streams or views, does that mean that *everyone* automatically has access to it, because any of us *could* have represented one of those streams or views? We now have a "reasonable opportunity" to hear a lot more music than we did when you had to hear something on the radio, or buy the record, to gain access. Suffice it to say: there are a lot of unanswered questions about when a claim of widespread dissemination will prove access. (More on that in Chapter Eight.)

When access rests on a **chain of events** theory, the evidence can range from a close connection between the plaintiff and defendant to more random and attenuated connect-the-dots claims. In a strong case of access, Kanye West was sued by a rapper named Vince P, who had given John Monopoly—West's close friend and business manager—a song by Vince P called "Stronger." When West's hit song "Stronger" came out, Vince P sued for infringement. Access was easily established through the common intermediary of John Monopoly. But in the end a court decided that West did not infringe copyright because the only similarities between the songs were the title (remember from the last chapter that titles are not copyrightable), a version of Nietzsche's public domain phrase "what does not kill me, makes me stronger," a set of rhymes (stronger, longer, wronger), and a reference to Kate Moss (hmmm).

Here are two weaker chain-of-events theories that were rejected by courts. In one case, the defendant was in a room with 15,000 records, including one containing the plaintiff's song, but there was no evidence she listened to it. In another case, there was uncorroborated testimony from the plaintiff's father's business partner that he sent a demo to a record company executive whose name he got from his dentist. (Yup.) Both of these stories were insufficient to show access. So if your argument is "I sang it in the shower and my neighbor must have heard it and her dog walker's hairdresser's cousin went to high school with someone who temped at Beyoncé's label three years ago," that's not enough. And if you send your demo to a record company, they will probably make sure they return it unopened so they can argue that they never had "access."

Shake It Off redux: Did Taylor Swift Have Access to "Playas Gon' Play"?

In Chapter Four we discussed the lawsuit claiming that Taylor Swift's song "Shake It Off" infringed copyright in the song "Playas Gon' Play." There, our focus was on whether a sequence of four tautological phrases that included the public domain phrases "playas gonna play" and "haters gonna hate" was protectable by copyright. Swift's legal team also argued that Swift did not have *access* to "Playas Gon' Play."[12]

[12] Swift had two fellow songwriters for "Shake It Off"—Max Martin and Shellback, both of whom are well-known in the music industry. The three songwriters all agreed in their declarations that while they collaborated on the music for "Shake It Off," the lyrics at issue were written entirely by Swift. Nonetheless,

The plaintiffs claimed that "Playas Gon' Play" was widely disseminated primarily in 2001, when it was played on the radio and a music video of it aired on the MTV show "TRL" (Total Request Live). Swift was 11 years old at the time. Was there a *reasonable possibility* that she heard the song?

Both Swift and her mother submitted sworn "declarations" to the court explaining that Swift could not have encountered the song on the radio, TV, or elsewhere. Declarations are legal documents, made under penalty of perjury, that become part of the factual evidence in a case. Swift stated: "Until learning about Plaintiffs' claim in 2017, I had never heard the song *Playas Gon' Play* and had never heard of that song or the group 3LW." According to Swift's lawyers, the song only played on one radio station where she lived, and in her declaration, Swift said that she rarely listened to radio and when she did it was generally country music—her favorite genre when she was growing up. Her mother added that they did not listen to stations that would have aired "Playas Gon' Play." Regarding the MTV show "TRL" Swift explained: "My parents limited what I could watch and listen to, and did not permit me to watch TRL until I was about 13 years old." Her mother confirmed that she "carefully monitored both the television [Taylor] watched and the music she heard" and did not let her watch MTV until she was older. Their declarations also ruled out hearing the song from other sources. Swift said that she never had any CDs with "Playas Gon' Play" on it or attended a concert where it was performed. Her mother said that the house had a single shared computer in their kitchen and it was not used to surf the web or play music. Outside of the house, Taylor stated "I did not go to clubs during this time," and her mother recalled "Taylor did not attend sleepovers at friends' houses as a young girl because we lived on a farm until she was 10 years old and I always preferred having friends come over to our home." From this testimony, it appears that she had few opportunities to copy from "Playas Gon' Play."

Instead, Swift said that she had encountered the phrases "players gonna play" and "haters gonna hate" elsewhere, "uttered countless times to express the idea that one can or should shrug off negativity." She heard them from other kids at school and at the Country Music Awards when Eric Church performed the song *The Outsiders*, which includes the line "the player's gonna play and a haters gonna hate." She even performed at the Billboard Music Awards wearing a shirt from Urban Outfitters that read "Haters Gonna Hate."

This gives you a sense of the kind of evidence that defendants submit to prove that they did not have access to plaintiffs' works. Sometimes this evidence is important to the outcome of a case, but other times the judge or jury accepts the plaintiffs' theory of access and the result ultimately turns on a different legal issue, such as whether there was *substantial similarity* of copyrightable material (covered later in this chapter).

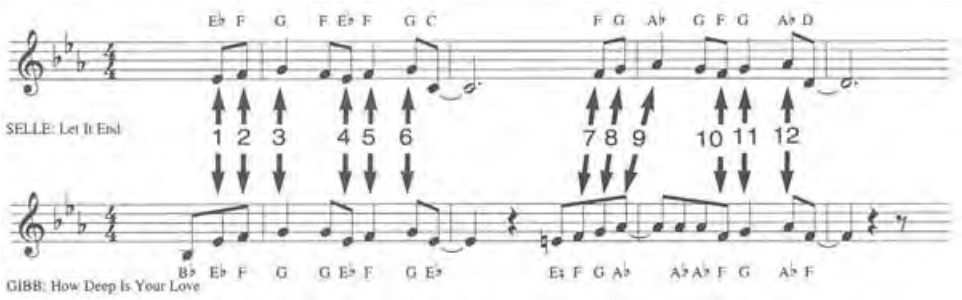
Beyond the question of access, certain *similarities* between two songs can also suggest that copying happened. If there is what the law calls "***striking* similarity**," then courts sometimes presume access, even if the evidence of access is weak. Under the law, striking similarities are supposed to be the kinds of similarities that "preclude the possibility of independent creation and coincidence." You can probably relate to this kind of "hunch": if

the other songwriters are named defendants in this case, so their access may be relevant too. It is unclear whether they will be deemed to have access.

two people write the same song down to every intricate detail but the defendant claims independent creation, you might not believe her. But, with music, as we have discussed, there are often a lot of similarities. They might seem "striking" in an abstract sense—two songs might share clusters of notes, harmonies, and rhythmic elements. But what if they are just the product of the limited range of musical choices? There is a danger that the concept of "striking similarity," if it is not confined to unusual or complex elements that actually suggest copying, will eclipse "independent creation," the possibility that you came up with that music yourself. We have to decide when it is plausible, and when it is simply not believable, that those similarities were a coincidence.

Most judges and juries do not have music backgrounds, and, as explained earlier, music is hard to analyze. In a lawsuit, "expert witnesses"—generally, musicologists with PhDs—are hired by both sides to opine on whether or not the similarities in a case point to copying. Sometimes these experts are helpful; other times they can be misleading. We have already discussed how notation is an imperfect representation of what music actually *is*. Experts often compound this by providing visualizations that exaggerate similarities or differences. A common practice is "note counting," which highlights the number of notes or pitches shared by two songs, but the notes are divorced from the musical context that informs how they actually *sound* (their duration, placement, underlying harmony, etc.). This can focus attention on similarities that are not musically meaningful. The beginnings of "Twinkle Twinkle Little Star" and "What A Wonderful World" have similar pitch sequences. Both openings follow the scale degrees 1–5–6–5 / 4–3–2–1, though they repeat the pitches different numbers of times. Yet, musically speaking, the songs are not similar, because of all of the other things going on in the music.

Here is an example of note counting from a famous case from the 1980s. The claim was that the Bee Gees' song "How Deep Is Your Love," infringed an unknown song called "Let It End," written by an Illinois antique dealer and musician named Ronald Selle. There was little evidence of access. Selle had played his song with his band two or three times in the Chicago area, and sent it to eleven music companies; eight returned it, and three did not respond. That was it. The Bee Gees clearly did not have a "reasonable opportunity" to hear the song. So Selle's expert tried to show that there was "striking similarity." Here is his testimony, using arrows to indicate similar notes.



These displays certainly make it look as though there is "striking similarity"! The problem was, despite his otherwise impeccable credentials, it turned out that this expert had never compared two popular songs, and could not testify about whether the kinds of similarities you see above were commonplace in popular music, or sufficiently *unique and complex* to indicate copying.

This brings us to the bottom of the flow chart. To refute a claim of factual copying, the defendant can always present their own evidence of **independent creation**.

Were the similarities a COINCIDENCE? To prove this, the defendant needs to show that the similarities resulted from their own INDEPENDENT CREATION and not from (conscious or subconscious) copying.

Defendants frequently say they independently created their songs, but it is hard for them to *prove* it. Often they will submit sworn testimony that they wrote the song themselves, but when plaintiffs and defendants disagree, it comes down to who the judge or jury believes. Sometimes they offer a "work tape" showing their songwriting process, but these are not always sufficient to establish independent creation. In the Bee Gees case, they produced a work tape showing how they created "How Deep Is Your Love" through a process of trial and error at the piano, while they were recording songs at the Château d'Hérouville outside of Paris (rough digs!). Despite this evidence, the jury in the case still found copyright infringement. *But* a court later overturned the jury verdict, saying that the expert's testimony about "striking similarity" was not enough to presume there was "access." (In Chapter Eight, we will read about a case that went the other way—in 2023 Ed Sheeran was able to convince a jury that he and his co-writer independently created "Thinking Out Loud.")

As you will see when we get to the "subconscious copying" cases, it is especially hard to prove independent creation when the claim is that the defendant copied *subconsciously*, because by definition the defendant was unaware of what was going on in their subconscious, and no work tape or other evidence can show what transpired in their *mind*.

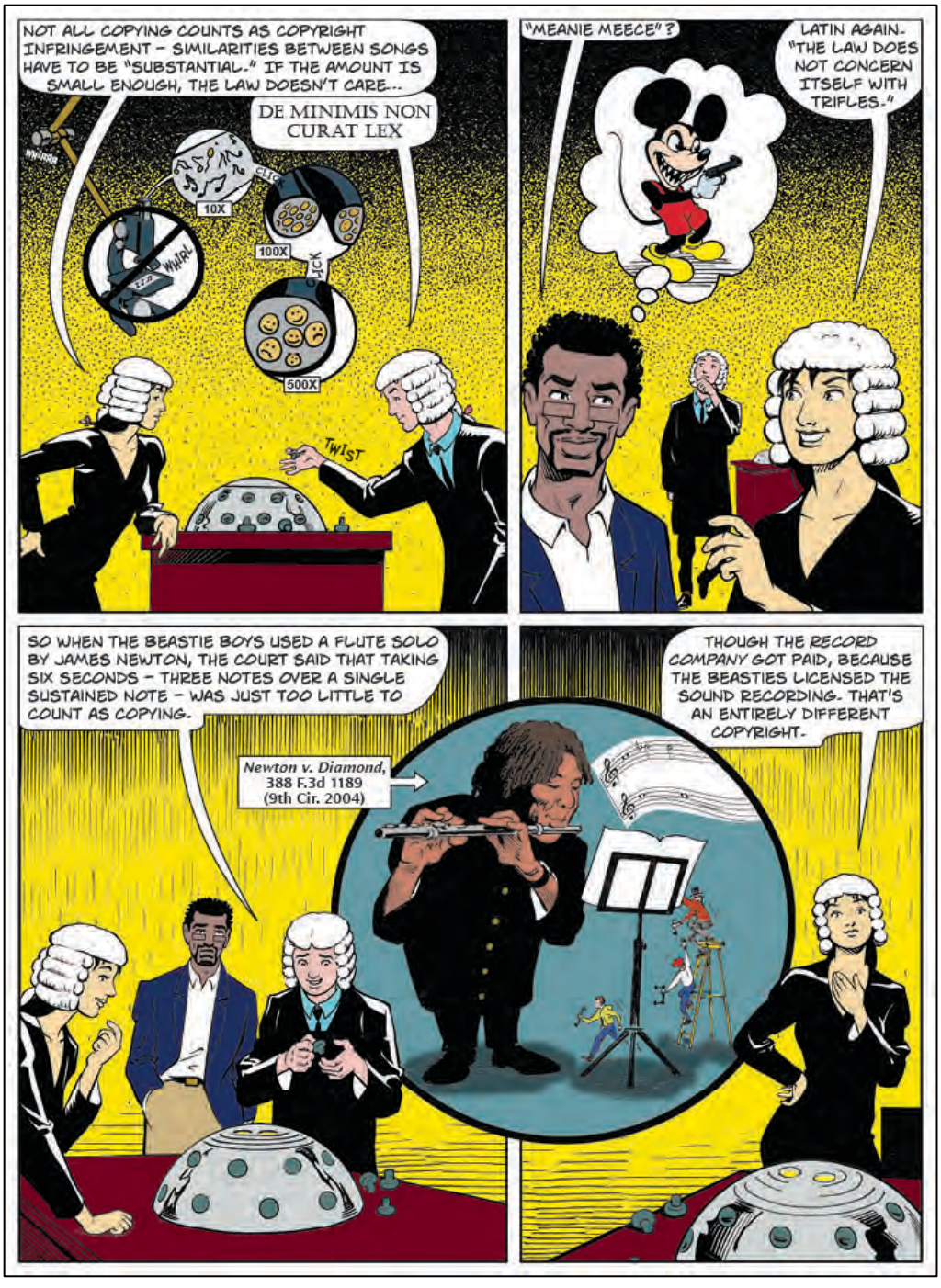
This brings us to an interesting *asymmetry* in copyright cases. Independent creation is relevant to both how you *get* a copyright, and how you *violate* someone else's copyright. Remember the definition of originality in Chapter Four? As long as something is independently created, and shows a modicum of creativity, it is original. So to own music, you have to show that you did not copy it from another song. In this chapter, we have just

discussed how, if you are sued for copyright infringement, you try to show that you independently created your song, in order to argue that you did not copy it from the plaintiff. In practice, it turns out to be easier to establish independent creation for *originality* purposes than to establish it as a *defense* against an infringement claim. In that context, as mentioned in the last chapter, plaintiffs often have the presumption of originality because of their copyright registration, so the scales are tipped in their favor. Courts frequently assume originality and move on. By contrast, for defendants, the scale is tipped in the other direction: they may need to overcome the inference of copying, and this "burden of proof" can be insurmountable. There is also a lot more evidence addressing the defendant's alleged copying—that's what the case is about, after all—than there is about whether the plaintiff copied from earlier works. Any individual case will involve more nuances, but independent creation often functions differently on either side of a legal dispute.

5.2 INSPIRATION OR THEFT?

Even if there is *factual copying*, including in cases when the defendant simply admits to copying, that does not mean there is copyright *infringement*. Some copying does not break the law: if you copy material that is not covered by copyright, or you did not copy too much, or you made a "fair use" (discussed in the next section), then you are in the clear. It's time to proceed to the **"substantial similarity"** inquiry, which asks: did the copying go so far as to be illegal?

Here are the comic book characters talking briefly about substantial similarity and *de minimis* copying, followed by the next segment from the flow chart.


NOT ALL COPYING COUNTS AS COPYRIGHT INFRINGEMENT – SIMILARITIES BETWEEN SONGS HAVE TO BE "SUBSTANTIAL." IF THE AMOUNT IS SMALL ENOUGH, THE LAW DOESN'T CARE...
DE MINIMIS NON CURAT LEX
10X
100X
500X
WHIRL
TWIST
"MEANIE MEECE"?
LATIN AGAIN. "THE LAW DOES NOT CONCERN ITSELF WITH TRIFLES."
SO WHEN THE BEASTIE BOYS USED A FLUTE SOLO BY JAMES NEWTON, THE COURT SAID THAT TAKING SIX SECONDS – THREE NOTES OVER A SINGLE SUSTAINED NOTE – WAS JUST TOO LITTLE TO COUNT AS COPYING.
Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004)
THOUGH THE RECORD COMPANY GOT PAID, BECAUSE THE BEASTIES LICENSED THE SOUND RECORDING. THAT'S AN ENTIRELY DIFFERENT COPYRIGHT.

Are the songs SUBSTANTIALLY SIMILAR?

Only similarities to copyright-protected elements of the plaintiff's work are relevant. Copying material such as ideas, facts, and *scènes à faire* is not infringement.

There is no clear rule about the necessary degree of similarity. Substantiality can be measured either "quantitatively" (meaning a substantial portion of the song was copied) or "qualitatively" (meaning that an important part of the song was copied, such as the hook or the most recognizable bit, even if it was quantitatively small). In either case, the similarity must be to portions protected by copyright.

Trivial or "*de minimis*" copying is not substantially similar.

At the end of the box, you can see that when the similarities are trivial or ***de minimis***, there is no infringement. This term comes from the Latin "de minimis non curat lex"—"the law does not concern itself with trifles." Many people assume that there is a hard and fast rule for *de minimis* copying, and that you can use a certain number of notes, or bars, or seconds of music. But there is no such "bright line." This question is also "fact-specific." But the *Newton* case discussed in the comic excerpt (and also in Chapter Four) provides an example of the kind of use that has been found de minimis.

Above the *de minimis* level, when are similarities enough to be "substantial"? This involves another intriguing exercise in line drawing. There are several things to note. First, the similarities have to be of **copyright-protected material**. If the only thing two songs share is a standard chord progression or other unprotectable material, these similarities do not count. This means that in order to assess substantial similarity, you need to look back at what is covered by copyright, and what is not, from the previous chapter. The "what does Artist A own" and "did Artist B impermissibly copy from Artist A" inquiries are linked. Second, "substantial" can be **quantitative**—did you use a large amount of the plaintiff's song?, or **qualitative**—even though you used a small amount, was it a super important part of the plaintiff's song, such as the memorable "hook"? Note that we always look at whether the material was a substantial part of the *plaintiff's* song, not the defendant's song; if the defendant takes two notes and loops it throughout their piece, this does not make those two notes "substantial." This is because the question is whether they took too much of what the *plaintiff* owns, not what they did with it in their song.

OK, so we need to identify which similarities between two songs are copyright-protected, and then decide whether they are "substantial." With something as complex as music, how exactly do we go about this task? The Ninth Circuit splits the substantial similarity inquiry into two parts. (Many other circuits also split it into two parts, but they formulate them differently.) There is only copyright infringement if there is substantial similarity under *both* tests.

- The first is called the **"extrinsic test."** Because the "extrinsic" terminology is a little strange, we will call this the "**analytical test**." This is an *objective*, *analytical* comparison of similarities between a defendant's song and copyright-protected material in the plaintiff's song. As with the factual copying inquiry, the comparison here relies on musical experts. They produce notation and other visualizations of the music, along with written descriptions. Not surprisingly, the plaintiff's expert will say that there are lots of meaningful, significant similarities, and the defendant's

expert will say that there are not. This analytical test can be decided by judges and allows them to rule for defendants when there are few similarities. However, in the Ninth Circuit, if there is "indicia of a sufficient disagreement" between the experts—which there normally is, since the experts are paid to disagree—judges have typically sent the case to a jury. This is why you will see so many jury trials when we get to our case studies. That said, there is some indication that courts in the Ninth Circuit are beginning to retreat from this tendency and might be more willing to reject weak copyright claims before sending them to a jury trial.

- The second part is called the **"intrinsic test."** We will call this the "**listening test**." It is a *subjective, intuitive* comparison of similarities from the perspective of what the law calls a "lay listener," defined as an "ordinary, reasonable" person listening to the songs. As one court explained, in a case that informed the Ninth Circuit's rules: "The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, *who comprise the audience for whom such popular music is composed*, that defendant wrongfully appropriated something which belongs to the plaintiff." Only a jury—as a proxy for the lay listener—is allowed to make this determination, and they are required to do so with *no expert assistance*. The idea behind this is that jurors are the people best situated to make the final determination about whether a defendant's copying has interfered with the plaintiff's market interests.

Notice what just happened here. Remember our exploration of music's duality, and how music is something you can *see*, and something you can *hear*? Something that you analyze *intellectually*, and react to *emotionally*? One way that this might map onto music is through the traditional idea of what was covered by the © right—sheet music that you read—versus what was covered by the ℗ right—the sound recording that you listen to. Here we are focusing only on the © right, where the duality also maps onto the test for infringement of a musical *composition*. The analysis has been split into an analytical test, with heavy reliance on expert *visualizations of music* (you will see many of these in Chapters Seven and Eight), and a listening test, focused on the layperson's *unmediated, auditory reaction*. These are two very different ways of engaging with music, and each is susceptible to distortions. Experts and lawyers for both sides will try to make the best possible case for their clients. Judges and juries then have to make the decisions. What could go wrong?

The ***analytical* test** is intended to be a cerebral exercise. However, unlike a book, a musical "work" is not represented by words on a page that most laypeople can read and interpret. Expert testimony can be confusing and contradictory, and the judge or jury might end up focusing on the wrong kinds of similarities or differences. (The melodies in two songs share twelve out of sixteen notes, *and* two underlying chords! This similarity looks *substantial*! Wait, are those elements copyrightable? Musically significant?) In the Mariah Carey case mentioned earlier, the court acknowledged the difficulty of applying this test to music, calling it "a somewhat unnatural task, guided by relatively little precedent" and "an awkward framework to apply to copyrighted works like music." But the court concluded:

"Nevertheless, the test is our law and we must apply it." If we want to anchor the analysis under this test, we will need rules about what kind of expert testimony is allowed, as well as careful sifting of protectable from unprotectable material.

The ***listening* test** is intended to be an intuitive, emotional exercise. But it is difficult to calibrate the act of listening so that it focuses only on copyrightable material. What we *hear*—and what we *like*—might be determined as much by uncopyrightable "scènes à faire" in a genre, or other familiar building blocks, as by material that is subject to copyright protection. Empirical research by Professor Jamie Lund further suggests that what we hear might be determined more by elements traditionally associated with *performance*—such as tempo, orchestration, and style—than by the melody, harmony, and rhythm typically associated with a copyrighted *composition*. When Lund played listeners different versions of the songs involved in the Mariah Carey case, 86.4 percent of the participants who heard the compositions *performed* similarly said that they were substantially similar. Participants who heard the same compositions performed differently went in the opposite direction, with 84.8 percent saying they were not substantially similar. So, depending on what they are invited to listen to, juries might be swayed by performance style more than compositional similarities. This brings us back to what we discussed at the end of the last chapter—the scope of the composition right can make a difference. So can the choices about what juries are allowed to hear; often they are played recordings specially produced for the trial, and there are vigorous disputes about what those recordings should include. Stepping back from the question of what we actually hear when we listen to music, consider the broader legal issue: is asking what is "pleasing to the ears of lay listeners" even the right way to decide whether the "defendant wrongfully appropriated something which belongs to the plaintiff"? This test, too, could benefit from some "fine tuning."

Now you know all about the substantial similarity framework in the Ninth Circuit, as well as some of the complexities in its application. The key thing to notice here is a basic tension at the heart of the inquiry. Courts want to distinguish between copyrightable and uncopyrightable material—so they allow expert evidence about which similarities are the result of common themes, stock elements, and material taken from the public domain, and they pay attention to the question of whether the material is part of the composition or the performance. But courts *also* want to tie the question of infringement to the perceptions of "the lay listener"—all of us—because we are the market for the work. Many of us do not have music degrees and may be swayed by similarities in uncopyrightable material or similar performance. What is "pleasing" may not be the same as what's copyrightable. **Notice how with substantial similarity, the analytical and listening tests are trying to resolve this contradiction within their frameworks, often not very successfully.** We will see how this all plays out in Chapters Seven and Eight.

Apply What You Have Learned, with Dua Lipa

Here is an opportunity to apply what you have read to a lawsuit. In 2022 the artist Dua Lipa was sued on both coasts for infringing copyright with her 2020 song "Levitating," ranked by *Billboard* as the #1 song of 2021 on its year-end Hot 100 Songs chart. In this exercise we will focus on the first lawsuit, which was filed in California and claimed that the melody infringed the copyright in the 2017 song "Live Your Life" by the Florida reggae band Artikal Sound System.

Composer and bassist Adam Neely provides an analysis of the similarities on YouTube. Before class, watch his analysis on YouTube—"Did Dua Lipa ACTUALLY Plagiarize Levitating?"—and read this text. As you watch the video, think about your initial reaction upon listening to the two songs. They sound very similar! Then consider Neely's musicological analysis. Here is his transcription of the similar material.

And here is some additional information.

- Both songs are in B minor and have similar tempos of around 100 bpm.
- The relevant harmonies use the same three chords—the I-V-IV minor seventh chords transcribed as Im7, Vm7, and IVm7. This is a common chord progression. Then they end on different chords—"Live Your Life" on the IVm7 and "Levitating" on the 1m7.
- The melodies emphasize a similar 5–4–4–4 pitch sequence.
- The similar rhythm has been around for a long time and even has a name: it's called the "Charleston" after the Charleston dance from the 1920s. It is a common rhythm that can be found in The Jacksons' "Blame It on the Boogie" and DNCE's "Cake by the Ocean."
- In the lyrics the "Levitating" rhyme scheme moonlight/ starlight/ all night is vaguely similar to the "Live Your Life" all night/sunrise/your life, with both using "all night."
- The closest prior art to both "Live Your Life" and "Levitating" is a sequence in the 1998 Outkast song "Rosa Parks." It is nearly identical.
- Dua Lipa cited Outkast as an inspiration for the album that contains "Levitating."
- Dua Lipa and her fellow songwriters documented their writing process on the podcast Song Exploder. Her producer Kos purchased a vintage synthesizer and started playing the four-chord loop at issue and Dua Lipa improvised melodies on top of it, eventually arriving at the contested melody.
- The availability of "Live Your Life" when "Levitating" was being written is unclear, but the song appears to have been relatively unknown. Around the time the lawsuit was filed "Live Your Life" was available via a SoundCloud link and an out-of-stock

CD but was no longer on streaming services. Someone else had posted it to YouTube but there were under 5,000 views at that time.

In the video Neely makes clear that he is not a lawyer but that as a music theorist he does not think there is a valid claim. For the class exercise, review what you have learned so far and evaluate the copyright claim through a legal lens. Do you think there was copyright infringement? What did your ears tell you? What about the musicological analysis? What would you say about 1) the copyrightability of the similar material, 2) access, and 3) substantial similarity of anything protectable? If you are skeptical about the claim, what additional facts would change your mind and point toward infringement?

In June 2023 the court dismissed this lawsuit on the ground that Artikal Sound System had not offered sufficient facts to support their claim that Dua Lipa had access to their song. The court did not reach the issue of substantial similarity. In March 2025 Dua Lipa also won the other case against "Levitating," which was filed in New York. That decision focused on substantial similarity rather than access, though Dua Lipa could plausibly have won on both grounds. These cases are discussed in more detail in Chapter Eight.

5.3 FAIR USE

It is time to finish our flow chart, and our final concept is "fair use." Even when there *is* substantial similarity, it is not infringement if it is a fair use.

Was the copying FAIR USE? Fair use sometimes allows copying for purposes such as creating "transformative" works, criticism, commentary, education, and news reporting. In music cases, fair use has generally been limited to cases involving parodies.

Here are the comic book characters discussing fair use in music cases.

HOW DOES FAIR USE PLAY OUT IN MUSIC?
THAT MUST BE THE KEY TO IT ALL, RIGHT? THINK OF ALL THE BORROWING THROUGHOUT MUSIC'S HISTORY! CHURCH MUSICIANS TAKING TROUBADOURS' TUNES, TCHAIKOVSKY TAKING THE FRENCH & RUSSIAN NATIONAL ANTHEMS, DVORAK GRABBING FOLK SONGS, JAZZ MUSICIANS QUOTING FROM OTHER SONGS. IF SOMEONE DID THOSE THINGS TODAY, IT WOULD ALL BE FAIR USE, RIGHT?
ER...
NOT...EXACTLY ...CLEAR...
FAIR USE
Campbell v. Acuff-Rose, 510 U.S. 569 (1994)
ONE OF THE MOST IMPORTANT FAIR USE CASES IS ABOUT MUSIC...
WHEN 2 LIVE CREW MADE A VERSION OF ROY ORBISON'S OH PRETTY WOMAN, THE SUPREME COURT SAID IT COULD BE FAIR USE.
"2 LIVE CREW JUXTAPOSES THE ROMANTIC MUSINGS OF A MAN WHOSE FANTASY COMES TRUE, WITH DEGRADING TAUNTS, A BAWDY DEMAND FOR SEX, AND A SIGH OF RELIEF FROM PATERNAL RESPONSIBILITY." – Justice David Souter
THEY COULD TAKE HIS SONG?
WITHOUT PERMISSION?
THE COURT SAID THAT AS A PARODY, 2 LIVE CREW'S VERSION HAD A STRONG FAIR USE CLAIM...
EVEN THOUGH IT WAS COMMERCIALLY SOLD AND TOOK A SIGNIFICANT PART OF BOTH THE LYRICS AND MUSIC!
BECAUSE A PARODY HAS TO USE THE ORIGINAL WORK IN ORDER TO PARODY IT!

OTHER THAN THE PARODY CASES, THERE'S A MYSTERIOUS SILENCE.
IN OTHER AREAS LIKE LITERATURE OR SCHOLARSHIP, WE HAVE LOTS OF EXAMPLES OF FAIR USE BEYOND PARODY – CRITICISM, QUOTATION, "TRANSFORMATIVE" USES...
MUSICAL FAIR USE: THE DOG THAT DIDN'T BARK!!!
BUT IN MUSIC, THOSE KINDS OF FAIR USE ARGUMENTS HAVE NOT BEEN MADE TO THE COURTS...
THE HIGHLY TRANSFORMATIVE USE OF A SAMPLED PIECE OF MUSIC IN A RAP SONG...
Welcome to GarageBand for iOS
...OR THE FRAGMENTARY QUOTE OF THE MUSIC OF THE TIME IN A SYMPHONY ABOUT THE CIVIL RIGHTS MOVEMENT...
EYES ON THE PRIZE:
...ARE EXCELLENT CASES FOR FAIR USE, BUT THE MUSIC-SPECIFIC CASE LAW ISN'T THERE, EVEN SO.
...AND THE PRACTICE IN THE INDUSTRY SEEMS TO BE TO PAY TO LICENSE MATERIAL EVEN WHEN A GOOD FAIR USE ARGUMENT EXISTS.
IT'S NEARLY AS BAD AS THOSE RIDICULOUS DEMANDS FOR LICENSES IN DOCUMENTARY FILMS!!*
...BUT THAT'S CRAZY! BY THAT LOGIC, JAZZ MUSICIANS SHOULD HAVE TO ASK FOR A LICENSE FOR EVERY TUNE THEY INCLUDE IN A SOLO.
*SEE BOUND BY LAW? – EDS.

YOU'RE RIGHT. THAT'S RIDICULOUS. WITHOUT QUOTATION THERE IS NO JAZZ. REQUIRING LICENSES WOULD DESTROY THE MUSIC.
COPYRIGHT IS SUPPOSED TO ENCOURAGE CREATIVITY, NOT DESTROY IT.
SO...
BUT FEDERAL JUDGES LISTEN TO JAZZ – OR KNOW IT IS CULTURALLY "RESPECTABLE."
WOULD THEY HAVE THE SAME INTUITIONS ABOUT RAP? OR SOMEONE LIKE GIRL TALK WHOSE MUSIC IS ENTIRELY MADE UP OF SAMPLES?
I LOVE THE LAYERED REMIXES IN *NIGHT RIPPER*...
BUT I THINK HE WAS BETTER IN *UNSTOPPABLE*...
WE DON'T KNOW, BECAUSE THE CASES AREN'T BROUGHT OR FAIR USE ISN'T CLAIMED.

SOME SAY IT'S BECAUSE RECORD LABELS ARE AFRAID OF EXPANSIVE FAIR USE DECISIONS, SO THEY WON'T CLAIM FAIR USE AGAINST EACH OTHER---
FAIR USE: THE MONSTER FROM THE BLACK LAGOON
SPECIAL PREMIERE! Badge Required
WELCOME MUSIC EXECUTIVES!
---OR THAT CLAIMING FAIR USE MEANS ADMITTING YOU COPIED IN THE FIRST PLACE- HIGH RISK! THE MUSIC BUSINESS ACTS AS THOUGH PERMISSION WERE ALWAYS NEEDED---
END RESULT? EVEN THOUGH LOTS OF MUSICAL BORROWING COULD BE FAIR USE, IN PRACTICE, LICENSES ARE GENERALLY DEMANDED.
WE'VE HANDED THE FUTURE OF MUSIC OVER TO LAWYERS AND ACCOUNTANTS ---AAARRGHH!!
SOLD
NO TRESPASSING
UNDER NEW MGMT
KEEP OUT
THAT'S IT!
YOU'VE GONE TOO FAR- I AM OUT OF HERE, HUMANS!
SMASH!!
MUSICAL INSPIRATION

Fair use is one of the most important exceptions in copyright law. The other one is the idea/expression distinction that was covered in the last chapter. The reason we have fair use is to keep copyright from doing the *opposite* of "promoting the progress." As the Supreme Court has explained:

From the infancy of copyright protection, fair use has been thought necessary to *fulfill copyright's very purpose*…The fair use doctrine requires courts to avoid rigid application of copyright when *doing so would stifle the very creativity which that law is designed to foster*.

Outside of music cases, fair use has safeguarded everything from recording TV shows in order to watch them later (this was called "time-shifting"), to reverse engineering computer code so that products can be interoperable (computer code is covered by copyright, and reverse engineering requires you to copy it), to all kinds of familiar uses of copyrighted material. Fair use allows a journalist to show a photograph of a protest, or a film critic to play a scene from the movie she is reviewing, or a scholar to quote from other experts in the field, or a teacher to include illustrative material in her PowerPoint slides. Even though the source material is copyrighted, no permission is necessary.

What happens when one artist wants to use another artist's copyrighted work? Fair use favors uses that are "**transformative**." The Supreme Court has made clear that such uses "lie at the heart of the fair use doctrine's guarantee of breathing space." A "transformative use" is one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." In other words, it does something *creative* and *valuable* with the material it borrows, rather than simply ripping it off; or, as the Supreme Court has described it, "avoiding the drudgery in working up something fresh."

In general, the more transformative the use, the more likely it is to be deemed fair. But that is not the only consideration. Even with transformative uses, commerciality and market substitution can cut against fair use. Whether your use is fair also depends on **how much** you used—the less, the better. Even if you only use a small amount, however, it can weigh against fair use if you used the most important part of the earlier work. Fair use also depends on whether your use harmed any of the plaintiff's legitimate **markets**—if everyone is going to go out and buy your work instead of the plaintiff's, or your use supplanted legitimate licensing markets, that is problematic. *Note* that this is a simplified version of a more complex inquiry—as you might have gathered, fair use is notoriously "fact-specific" (yes, that again).

As you read in the comic, with music, most of the successful fair use cases have involved *parodies*. **A parody is a work that conjures up an earlier work in order to ridicule or make fun of it.** You can see why parodies would need fair use protection: they *have* to copy the other work in order to summon the target of the parody, but they are unlikely to get permission from the copyright owner, since they are lampooning her art.

Rumor alert: You sometimes hear people talking about a "parody exception" to copyright law. There is no freestanding exception; parody is just one example of the kinds of uses that have been deemed "fair." You also hear people saying that parodies (which comment on or ridicule the original work) are fair uses, and satires (which use the work to comment on some other subject) are not. This is not categorically true. Both are "transformative" and can qualify for fair use, subject to the aforementioned provisos. The key difference between them is that a *parody* is commenting on the copyrighted work itself, while a *satire* is using the copyrighted work to make a point about something *else.* The

Supreme Court has said that a parody has a slightly stronger claim to fair use because it "*needs* to mimic an original to make its point." Of course, many works have elements of parody *and* satire, so we are not always dealing with a binary either/or. A famous copyright case involved the book *The Wind Done Gone*, which borrowed parts of the book *Gone With the Wind* in order *both* to skewer *Gone With the Wind* for its racist and romanticized depiction of the Antebellum South (parody), *and* to make a larger commentary about slaveholding society (satire). A court said that *The Wind Done Gone* was a parody and had a strong claim for fair use.

Let's turn to the fair use cases involving music. You have already read about the 2 Live Crew case in the comic. The Supreme Court said that 2 Live Crew's version of the Roy Orbison song "Oh Pretty Woman" was a parody, and eligible for fair use. The case is called *Campbell v. Acuff-Rose*—that's the same Luther Campbell from the "It's Your Birthday" case discussed in the last chapter. Here are some other noteworthy music cases—note, some of these cases involve music or themes that are deliberately made offensive or shocking.

Listen to the songs

The Family Guy. This first case illustrates the tendency by courts to shoehorn fair use analyses into the framework of parody. It also illustrates how, consistent with First Amendment principles, fair use protects parodies even when they are offensive. You may have heard of the animated television series *The Family Guy*, which centers around the Griffin family. One of its characters is Peter Griffin, the dad of the family, who often makes provocative, offensive, and ridiculous statements, in order to serve as a foil for the series' humor. *The Family Guy* had an episode called "When You Wish Upon A Weinstein." In the plot, Peter messes up the family finances (again). After hearing his friends talk about how people with Jewish-sounding names (e.g., the titular Weinstein) have helped them with their finances, he sings a song called "I Need a Jew," which echoes the famous song "When You Wish Upon a Star" from the Walt Disney film *Pinocchio*. The scene shows Peter looking out of a window, just as Geppetto looks out of the window in *Pinocchio* when he wishes for a "real boy." The lyrics for "I Need a Jew" begin:

> Nothing else has worked so far,
> So I'll wish upon a star,
> Wondrous dancing speck of light,
> I need a Jew…

Many of us may find the lyrics offensive. The copyright owner of "When You Wish Upon a Star" certainly did, and brought a lawsuit. The court said the new song was a parody, and a fair use. Here is its reasoning:

> By juxtaposing the "saccharin sweet" song "When You Wish Upon a Star" with "I Need a Jew" …[The Family Guy] calls to mind a warm and fuzzy view of the world that is ultimately nonsense; wishing upon a star does not, in fact, make one's dreams come true. By pairing Peter's "positive," though racist, stereotypes of Jewish people with that fairy tale world-view, "I Need a Jew" comments both on the original work's fantasy of Stardust and magic, as well as Peter's fantasy of the "superiority" of Jews. The song can be "reasonably perceived" to be commenting that any categorical view of a race of people is childish and simplistic, just like wishing upon a star….
>
> The Court's finding is further supported by Defendants' proffered evidence that the song in the Episode makes an additional comment, or "inside joke", about the "widespread belief" that Walt Disney was anti-Semitic.

What do you think? Was *The Family Guy* using "When You Wish Upon a Star" to comment on that *song*, and how naïve it is, and also to make a more oblique reference to Walt Disney's reputed anti-Semitism? Or were they just using the song because it was a funny way to ridicule Peter's bigotry? The first would make it a parody, and the second a satire. Should it matter?

Perhaps you are a fan of *The Family Guy* and believe that the show is not actually adopting the views it features, but rather exposing them to open scrutiny and ridicule. Perhaps you disagree with the court and think that allowing anti-Semitic content only emboldens the kind of bigotry it purports to skewer. Either way, *one of the key things about the fair use doctrine, and the speech or music that it protects, is that we do not get to make rules that only favor the art we like, or that embody our own values*. The fair use exception will protect people and causes you strongly support, and also protect people and causes you abhor. Fair use is intended to reflect First Amendment considerations, and the First Amendment protects all kinds of speech—political, edgy, outrageous, and even offensive. Both the control afforded by copyright and the freedom afforded by fair use apply to citizens regardless of the values reflected in their speech, or in their music. Assume that you really like artist X, and vehemently disagree with artist Y. If you give the right of control to X, you are also giving it to Y. If you give a right to remix or parody to X, you are also giving it to Y. This means that lawyers and judges have to ask different questions than the ones we might gravitate toward. They do not ask, "do I agree with this particular parody or am I offended by it?" Rather they ask, "what is the right balance between control and freedom – and property and free speech – *in general?*," knowing that the rules laid down will then be applied to all comers.

Ghostface Killah. Hip hop artist Ghostface Killah (a former member of the Wu Tang Clan) used a few lyrics and musical elements from the song "What a Wonderful World," popularized by Louis Armstrong, in his song "The Forest." The first three lines of the Armstrong version are:

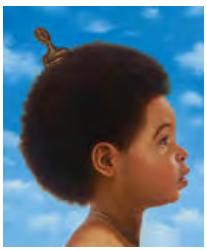
I see trees of green, red roses too
I see them bloom for me and you
And I think to myself, what a wonderful world.

In "The Forest," these lyrics became:

I see *buds that are* green, red roses too
I see *the blunts* for me and you
And I *say* to myself, what a wonderful world.

The judge in this case said that "The Forest" was a parody, and that the lyrical and musical transformations made the copying a fair use:

The primary aim of The Forest is to portray the modern world as corrupted and venal, and it uses Wonderful World to underscore that message, by providing an ironic contrast to the body of the song. While the world of Wonderful World is all flowers and light, the world of The Forest is a "wonderland" that is hardly wonderful…
Where the most famous recording of Wonderful World is lushly orchestrated, with strings playing the melody in a major key, evoking a feeling of peace and harmony, The Forest's version is recited a cappella, with a single male singer intoning the words off-key, in a tone that might reasonably be perceived as sarcastic. The final line of the quotation, "And I say to myself, what a wonderful world," sounds positively ominous: While in the original, the melody ascends to the phrase "wonderful world," in The Forest, the entire line is intoned on a single note, negating the optimistic, happy feeling created by the original. Although the quotation as a whole is sufficiently recognizable to instantly evoke the original in the listener's mind, the alterations in the lyrics and the music, taken together, present a very different view of the world, and the phrase "wonderful world," in this context, takes on a cynical, ironic meaning.



Drake. In his song "Pound Cake/Paris Morton Music 2," Drake sampled from a part of an album by the jazz artist Jimmy Smith, in which Smith talks about making music. In the sampled segment, Smith concludes by saying that jazz is better than other music: "Jazz is the only real music that's gonna last. All that other bullsh*t is here today and gone tomorrow. But jazz was, is and always will be." Drake changed this line to: "Only real music is gonna last, all that other bullsh*t is here today and gone tomorrow." The court concluded that Drake "transforms Jimmy Smith's brazen dismissal of all non-jazz music into a statement that 'real music,' with no qualifiers, is 'the only thing that's gonna last.'" This was a fair use.

This case was celebrated as the first time that sampling was found to be fair use. Note that Drake only sampled words, not music. Drake's use *seems* like a "parody"—he is using Smith's work in order to critique its jazz elitism—but the court thought it was technically not a parody and categorized it simply as "transformative." The court's rationale was that the "average observer" would not recognize Smith's obscure spoken word recording, so it could not be a parody, because "what good is parody if the listener cannot identify the target of

derision?" It is not clear, however, that works are only "parodies" when the average observer recognizes the object of criticism.

These cases were all from after 2000. Here are some earlier fair use cases involving music: changing "When Sunny Gets Blue" into "When Sonny Sniffs Glue" was a parody and fair use (1986); *Saturday Night Live*'s "I Love Sodom" skit was a fair use parody of "I Love New York," a public relations campaign for New York (1980); and *MAD Magazine*'s parodies including making "The Last Time I Saw Paris" into "The First Time I Saw Maris" and "A Pretty Girl Is Like a Melody" into "Louella Schwartz Describes Her Malady" were also fair use (1964). However, "The Cunnilingus Champion of Company C" was held *not* to be a fair use of the 1940s song "Boogie Woogie Bugle Boy (of Company B)" (1976).

Weird Al Yankovic, and Licensed "Parodies"

Some of you may have heard parodies by an artist called Weird Al Yankovic. Yankovic actually licenses all of his parodies and satires. (Note that while his songs are generally referred to as "parodies," many may better fit the definition of "satire" discussed earlier.) When rights holders say "no," he does not release the new song. Eminem, Prince, Weezer, and others have denied permission. Michael Jackson shares a credit for Yankovic's "Eat It," based on Jackson's "Beat It," but denied consent to Yankovic's "Snack All Night" version of Jackson's "Black or White," because that song had a more serious message. Paul McCartney said no to a "Chicken Pot Pie" parody of "Live and Let Die," but not for the reason you might think. McCartney said, "I would love for you to do this, but could you not make it about chicken because I'm a vegetarian. I don't want to condone the eating of animal flesh." Yankovic decided that "it wouldn't work with 'Tofu Pot Pie.'"

Here is why Yankovic gets licenses, according to his website FAQ:

> While the law supports his ability to parody without permission, he feels it's important to maintain the relationships that he's built with artists and writers over the years. Plus, [Weird] Al wants to make sure that he gets his songwriter credit (as writer of new lyrics) as well as his rightful share of the royalties.

Getting permission allows Yankovic to work in the clear and make agreements about credit and royalties. This approach might work for Yankovic, whose lighthearted songs are more funny than critical, and whose métier is to make parodies and satires by the dozen. But it is unlikely to work for artists who wish to make a particular, scathing statement using copyrighted material. As you have seen, their parodies are often not appreciated.

Notice what the music fair use cases we have covered have in common. An earlier song is deliberately referenced in the service of conveying a humorous or critical message. And there is some reworking of *lyrics.* It is easier to identify commentary and criticism when we are dealing with words. How would you parody music, standing alone? Maybe through the kinds of transformations made by Ghostface Killah?

However, **the intended scope of "fair use" is much broader than parody. What if you are just *making music*?** You can probably think of a lot of other musical uses that might qualify for fair use protection because blocking them would "stifle the very creativity which

[copyright] law is designed to foster." What about a transformative *homage*? What if the song "D.O.G. in Me," discussed in the last chapter, was quoting a few snippets from "Atomic Dog" as a tribute to George Clinton? (They tried that argument. It failed.) What about all of the musical borrowing that we have seen in this book? Is all of it presumptively illegal, even if it is transformative and takes relatively little? Clearly not. What about the longstanding tradition of brief *quotation* from earlier works, in order to build on them? What about Barry's remixes, and all of the bits and pieces he arranges into a totally new context? What if an artist quotes a song not so much as a "shout out," but as a building block layered into a totally different work? As an example, the rap group N.W.A was sued for taking a two-second, three-note sample of an arpeggiated guitar chord. They changed it so it sounded like a police siren, and put it in the background of a song about the police. That is *highly* transformative (check) and only uses a tiny amount (check). It *should* certainly be a fair use. But in its ultimate decision the appeals court avoided discussing fair use, stating "we express no opinion on its applicability to these facts." We will cover this case in more detail in Chapter Nine.

The comic book discussed some possible reasons for this absence of music fair use cases outside the context of parody. First, making a fair use argument would not make sense in the kinds of cases we were talking about earlier in this chapter, when defendants are arguing that any similarities were a *coincidence*, because claiming fair use would require admitting they purposefully copied in the first place. Second, the music industry may have adopted a practice of seeking licenses even when uses could be "fair," so that when they are on the other side of the borrowing they can stop others from using *their* music, even if it could be "fair." A fair use "win" could mean less control down the line, so this is "mutually assured obstruction." Third, particularly outside of the mainstream music industry, some kinds of borrowing are still accepted and tolerated, and do not result in lawsuits that would create legal precedent. Instead of mutually assured obstruction, this is "live and let live." Finally, you have already read about why artists such as Weird Al Yankovic license everything—for professionals who are *able* to obtain permission, there are benefits to doing so instead of risking a lawsuit.

Whatever the explanation, the result for copyright law is that *fair use is not as protective as it could be for music*. This brings us back to the challenges of applying copyright's rules, which were calibrated for books, to music. The two most important exceptions in copyright law are: 1) the idea/expression distinction, and 2) fair use. As mentioned in the last chapter, these are the two "safety valves" in copyright law that keep it from violating the First Amendment. As the Supreme Court has explained:

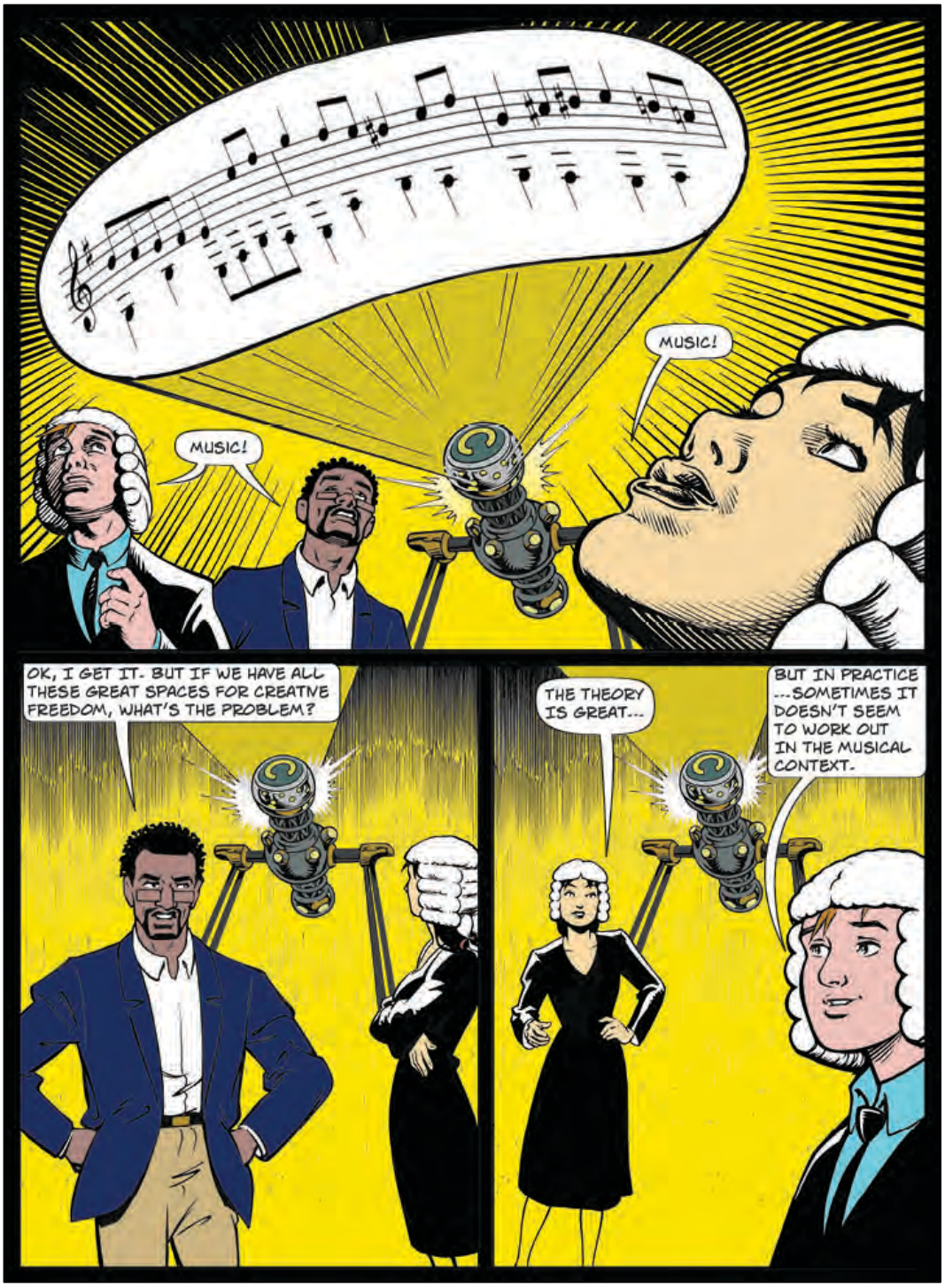
> Copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection…every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication….Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances…The fair use defense affords considerable "latitude for scholarship and comment," and even for parody.

With the written word, you can appreciate how the freedom to use ideas and facts, and to engage in "fair use," allows some latitude for free speech. If you are trying to write a book about the college admissions process, you can use all of the ideas and facts from any book, article, blog, or other resource. You can also quote from their "expression" to support your conclusions, or challenge theirs, or illustrate your points. But, as we have discussed, with *music*, it is difficult to identify independent *ideas and facts*, and *fair use* has been largely confined to parodies. These "built-in First Amendment accommodations" do not provide the same "breathing space." That makes other tools for balancing control and freedom—such as distinguishing between what is owned and free, and safeguarding independent creation—more important when we are trying to promote *musical* progress.

We have now covered many of the most important rules in music copyright. Coming full circle, here is an illustrated summary of where we are so far.

THE LAW
ENTER COPYRIGHT LAW.
DURING MOST OF HUMAN HISTORY, PROPERTY LAW WAS FOREIGN TO MUSIC.
AND THE LAW AND TECHNOLOGY WEREN'T NEATLY SYNCHRONIZED, PROBABLY A GOOD THING. WE DIDN'T GET RIGHTS OVER "COPIES" UNTIL CENTURIES AFTER GUTENBERG.
REVOLUTIONARY TECHNOLOGY OVER HERE!? HELLO?!!
MUSIC COPYRIGHT BEFORE 1710
BUT STARTING IN THE 18TH CENTURY, WE STARTED USING COPYRIGHT AS A WAY OF ENCOURAGING MUSIC.
A BRILLIANT IDEA! IT GIVES RIGHTS TO CREATORS. BALANCES CONTROL WITH LIMITATIONS, POWERS WITH FREEDOMS...
ENCOURAGES THE CREATION OF NEW STUFF BY THIS CAREFUL PATTERN OF RIGHTS AND EXCEPTIONS...
...PROPERTY...
...AND THE PUBLIC DOMAIN.
THE CONCEPT IS MAGNIFICENT.
THE REALITY, LESS SO?

WE KNOW THAT COPYRIGHT ISN'T AN ABSOLUTE RIGHT. IT'S A MIXTURE OF RIGHTS AND LIMITATIONS...
IT'S THE BALANCE BETWEEN THEM THAT MAKES COPYRIGHT WORK.
WHIRL
CLICK
ZZZT
PFFT
BECAUSE COPYRIGHT'S GOAL IS TO ENCOURAGE CREATIVITY, AND FOR CREATIVITY THE LIMITATIONS ARE AS IMPORTANT AS THE RIGHTS!
SO WHAT MIGHT FIRST LOOK LIKE A...
COLANDER?...
NO! SO WHAT MIGHT FIRST LOOK LIKE A...
RAY GUN?...
WHAT LOOKS LIKE IT IS A RANDOM PATTERN OF PRESENCE AND ABSENCE, RIGHTS AND EXCEPTIONS...
OFF
ON
CLICK
---IS IN FACT DESIGNED TO ENABLE US TO MAKE...


MUSIC!
MUSIC!
OK, I GET IT. BUT IF WE HAVE ALL THESE GREAT SPACES FOR CREATIVE FREEDOM, WHAT'S THE PROBLEM?
THE THEORY IS GREAT...
BUT IN PRACTICE ...SOMETIMES IT DOESN'T SEEM TO WORK OUT IN THE MUSICAL CONTEXT.

SUMMARY

As we explained in the comic, copyright law is a relatively recent development, with a fascinating pattern of presences and absences, rights and exceptions, that are designed to enable us to make…music! It is a brilliant design. The rules that we have covered try to strike a balance—preventing excessive copying, while leaving room for benign and inevitable similarities.

But the law doesn't always function as intended and applying these rules has proven to be complicated, especially when dealing with music. We have now looked at factual copying, unlawful appropriation, and fair use in detail, and seen some examples of how those inquiries play out in practice. If you think of each of the rules we have covered as sliders on a mixing board, it is the courts' job to move them in the direction that best fosters musical creativity. As you read the following chapters, think of the questions posed earlier: "Did we make the right decisions?" "Are we still making them?"

In the next chapter, we will focus on a fascinating wrinkle to the question of factual copying. It might surprise you to learn that you can violate copyright *subconsciously*. Even if you did not *know* that you were copying—even though, so far as you are aware, you wrote your song yourself, or in copyright-speak, "independently created" it—a judge or jury might decide that your mind "played a trick on you" and conclude that you copied anyway. Chapter Six will explore how this notion of subconscious copying developed, the assumptions behind it, and its implications for music.

6

Subconscious Copying

Inside This Chapter

6.1 PAUL MCCARTNEY AND "YESTERDAY" 149
6.2 THREE "SUBCONSCIOUS COPYING" CASES 151
6.3 A FACTUAL INFERENCE 159
6.4 PROVING AN UNKNOWN 161
6.5 RECALIBRATING THE BALANCE? 164

In Chapter Five, we looked at how the law decides whether or not there was copying, and whether that copying violated the law. Chapter Six digs deeper into the question of "factual copying" from the last chapter—in this case, deeper into the mind. When we are deciding whether similarities were coincidental, or the result of copying, what happens when "subconscious copying" enters the picture? In an online world where all of us could potentially be exposed to any song from anywhere in the world, how does one show one did *not* copy from one of those songs? In an online world where infringers could potentially appropriate from any tune produced anywhere in the world, how does an artist show that they *were* copied? If we have to consider subconscious copying, proving either of these possibilities becomes even more interesting, because by definition we cannot know what *actually* happened in the musician's mind.

What music might be lurking, somewhere, in the recesses of your memory? Remember all the music you thought about while reading the Introduction to this book? Lullabies from childhood. Songs you sang at school or camp. Background music at parties, sporting events, shopping malls. Movie soundtracks. Playlists blaring in the car.

A lot of this music is copyrighted. As you learned in Chapter Two, music written over the last 95 years may still be covered by copyright. What if a fragment of a song gets stuck in your head, and years later you write a tune that mines that subconscious memory? Is that copyright infringement, or just the normal process of creativity?

6.1 PAUL MCCARTNEY AND "YESTERDAY"

To better understand the creative process, let's peer inside the mind of legendary songwriter Paul McCartney, who Guinness World Records has named the "most successful

songwriter" of all time. McCartney, a former member of The Beatles, has written hundreds of songs, including thirty-two #1 singles. He co-wrote (with John Lennon) some of The Beatles' greatest hits, including "Let It Be," "Hey Jude," and "Yesterday." Where does he get his inspiration?

In an interview with the journalist David Frost, McCartney credited songs from his youth that had lodged in his subconscious: "My first taste in music would be the family singalongs… I took it all in like a sponge… I had been noticing, without realizing it, the structure of the songs, and some of the tricks, and some of the things, that would later find their way into my songs, just because they were in my sort of subconscious."

McCartney offered a similar account to Steven Colbert on The Late Show.

> Colbert: "People talk about a muse, or someone is sort of touched by grace… Why do some people become Paul McCartney, and other people become Stephen Colbert?"
>
> McCartney: "You know what, my dad was very musical, and I used to listen to lot of what he did. So a lot of music went in—you know I'd listen to records and watch films and stuff—so I always think of it like my computer got loaded with a lot of data from all the songs I heard, all the old songs… So when I finally came to write, I kind of printed it all out… I think I had a lot of clues as to how to write."
>
> McCartney continues: "Plus: I'm a genius."

McCartney then tells Colbert how the famous Beatles song "Yesterday" came to him in a dream: "I woke up one morning, and there was this tune in my head." McCartney hurried to play the song on a piano and wondered, "What *is* this? I thought, it's just an old tune that my dad must have played, or I just heard it… yesterday." He played the song for others, including John Lennon and The Beatles' producer George Martin, asking them: "What's this? What's this tune?" No one recognized it. The story concludes:

> McCartney: "So after about a couple of weeks, I decided it was mine!"
>
> Colbert: "And no one came out of the woodwork!"
>
> McCartney: "Not yet!"

Fun fact: Only the music for "Yesterday" appeared in the dream. While McCartney worked with John Lennon on the lyrics, the words they used to keep the tune in place were "Scrambled Eggs/ Oh my baby how I love your legs/ Not as much as I love scrambled eggs." Catchy, huh?

So, McCartney—like many songwriters—drew on *both* his own "genius," and the music that was stored in the "sponge" or a "computer" of his mind. And the song "Yesterday" literally sprang forth from his subconscious.

What if someone *did* come out of the woodwork and sue Paul McCartney for copyright infringement? **Can you break the law by copying something *subconsciously*?** Given the

role of the subconscious in the creative process, this question is an important one. Let's explore the cases addressing it. As it happens, the most well-known case involved another former member of the Beatles, George Harrison. But the issue first arose all the way back in 1924.

6.2 THREE "SUBCONSCIOUS COPYING" CASES

There are three major cases dealing with subconscious copying (also referred to as "unconscious copying") and music. Here is an illustrated tour through those cases, followed by discussion.

1) *Fisher v. Dillingham (1924):* "It is no excuse that … his memory has played him a trick."

In 1924, Judge Learned Hand (Photo 6.1) decided that a popular composer named Jerome Kern, in writing his song "Kalua," had "unconsciously" copied an "ostinato"—a repeated musical phrase—from a song called "Dardanella." The ostinato was described by the judge as "very simple." It consisted of eight notes, and while the same sequence of notes recurred in a number of other songs, it was rarely used as an ostinato.

Photo 6.1

The judge presumed unconscious copying based on two key factors: 1) Mr. Kern was familiar with "Dardanella" because it was popular shortly before Kern wrote his song, and he "had necessarily known [Dardanella], as a musician knew it," and 2) the ostinatos in the two songs were identical—they not only contained the same notes, but served the same musical function (as a repetitive background accompaniment). Judge Hand concluded:

> Everything registers somewhere in our memories, and no one can tell what may evoke it. On the whole, my belief is that, in composing the accompaniment to the refrain of "Kalua," Mr. Kern must have followed, probably unconsciously, what he had certainly often heard only a short time before. I cannot really see how else to account for a similarity, which amounts to identity.

Even though the copying was unconscious, Judge Hand ruled that it nevertheless violated copyright law:

> Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.

2) *Bright Tunes v. Harrisongs* (1976)

Now we fast forward to the next case addressing subconscious copying, involving former Beatle George Harrison. Here is a comic book excerpt discussing the case.

REMEMBER THE SONG BY THE CHIFFONS, HE'S SO FINE?
HE'S SO FINE [DO-LANG-DO-LANG-DO-LANG]
I SO WANTED TO BE "THE BOY WITH THE WAVY HAIR" THEY WERE TALKING ABOUT.
HENCE THAT HAIRSTYLE?
WISH HE WERE MINE [DO-LANG-DO-LANG-DO-LANG] ---I DON'T KNOW HOW I'M GOING TO DO IT, BUT I'M GONNA MAKE HIM MINE---
AND REMEMBER GEORGE HARRISON'S MY SWEET LORD?
MY SWEET LORD, MMM MY LORD- ---I REALLY WANT TO SEE YOU, REALLY WANT TO BE WITH YOU...
WELL, I ADMIT THEY SOUND PRETTY SIMILAR...BUT I DON'T THINK GEORGE HARRISON WOULD HAVE DELIBERATELY COPIED THE CHIFFONS---
THE JUDGE AGREED WITH YOU!
SO HARRISON WON?
NOT EXACTLY...

Bright Tunes Music v. Harrisongs Music,
420 F. Supp. 177 (S.D.N.Y. 1976)
A court ruled George Harrison infringed copyright by subconsciously copying The Chiffons' song He's So Fine in My Sweet Lord.
"HIS SUBCONSCIOUS KNEW IT ALREADY HAD WORKED IN A SONG HIS CONSCIOUS MIND DID NOT REMEMBER.... DID HARRISON DELIBERATELY USE THE MUSIC OF HE'S SO FINE? I DO NOT BELIEVE HE DID SO DELIBERATELY. NEVERTHELESS, IT IS CLEAR THAT MY SWEET LORD IS THE VERY SAME SONG AS HE'S SO FINE WITH DIFFERENT WORDS, AND HARRISON HAD ACCESS TO HE'S SO FINE. THIS IS, UNDER THE LAW, INFRINGEMENT OF COPYRIGHT, AND IS NO LESS SO EVEN THOUGH SUBCONSCIOUSLY ACCOMPLISHED."
JUDGE RICHARD OWEN
MY LITTLE SUBCONSCIOUS IS ALL GROWN UP AND INFRINGING COPYRIGHT!
SOMETIMES A DO-LANG IS ONLY A DO-LANG.
THAT SOUNDS SO FINE BUT I THINK IT'S MINE... DO-LANG-DO-LANG-DO-LANG...
I WAS JUST VAMPING SOME CHORDS AND NEXT THING YOU KNOW... HAL-LE-SUE-YA!

Listen to the songs

Here are excerpts from the legal decision in this case. First, Judge Owen lays out the musical similarities.

He's So Fine, recorded in 1962, is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase, "sol-mi-re," (hereinafter motif A),

altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B).

While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go "sol-la-do-la-re-do."

My Sweet Lord, recorded first in 1970, also uses the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four. In place of He's So Fine's fourth repetition of motif B, My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition.

The judge then summarizes how "My Sweet Lord" was written. Compare this process to that of Paul McCartney or Jerome Kern.

George Harrison, a former member of The Beatles, was aware of He's So Fine. In the United States, it was No. 1 on the Billboard charts for five weeks; in England, Harrison's home country, it was No. 12 on the charts on June 1, 1963, a date upon which one of the Beatles' songs was, in fact, in first position. For seven weeks in 1963, He's So Fine was one of the top hits in England.

According to Harrison, the circumstances of the composition of My Sweet Lord were as follows. Harrison and his group, which include an American black gospel singer named Billy Preston, were in Copenhagen, Denmark, on a singing engagement. There was a press conference involving the group going on backstage. Harrison slipped away from the press conference and went to a room upstairs and began "vamping" some guitar chords, fitting on to the chords he was playing the words, "Hallelujah" and "Hare Krishna" in various ways. During the course of this vamping, he was alternating between what musicians call a Minor II chord and a Major V chord.

At some point, germinating started and he went down to meet with others of the group, asking them to listen, which they did, and everyone began to join in, taking first "Hallelujah" and then "Hare Krishna" and putting them into four part harmony. Harrison obviously started using the "Hallelujah," etc., as repeated sounds, and from there developed the lyrics, to wit, "My Sweet Lord," "Dear, Dear Lord," etc. In any event, from this very free-flowing exchange of ideas, with Harrison playing his two chords and everybody singing "Hallelujah" and "Hare Krishna," there

began to emerge the My Sweet Lord text idea, which Harrison sought to develop a little bit further during the following week as he was playing it on his guitar. Thus developed motif A and its words interspersed with "Hallelujah" and "Hare Krishna."

Approximately one week after the idea first began to germinate, the entire group flew back to London because they had earlier booked time to go to a recording studio with Billy Preston to make an album. In the studio, Preston was the principal musician. Harrison did not play in the session. He had given Preston his basic motif A with the idea that it be turned into a song, and was back and forth from the studio to the engineer's recording booth, supervising the recording "takes." Under circumstances that Harrison was utterly unable to recall, while everybody was working toward a finished song, in the recording studio, somehow or other the essential three notes of motif A reached polished form.

"Q. [By the Court]: . . . you feel that those three notes . . . the motif A in the record, those three notes developed somewhere in that recording session?

"Mr. Harrison: I'd say those three there were finalized as beginning there."

* * * * * *

"Q. [By the Court]: Is it possible that Billy Preston hit on those [notes comprising motif A]?

"Mr. Harrison: Yes, but it's possible also that I hit on that, too, as far back as the dressing room, just scat singing."

Similarly, it appears that motif B emerged in some fashion at the recording session as did motif A. This is also true of the unique grace note in the second repetition of motif B.

"Q. [By the Court]: All I am trying to get at, Mr. Harrison, is if you have a recollection when that [grace] note popped into existence as it ends up in the Billy Preston recording."

* * * * * *

"Mr. Harrison: . . . [Billy Preston] might have put that there on every take, but it just might have been on one take, or he might have varied it on different takes at different places."

Finally, the judge explains the reasoning behind his conclusion (part of this was in the comic illustration you just read). Compare this to Judge Hand's explanation.

Seeking the wellsprings of musical composition–why a composer chooses the succession of notes and the harmonies he does–whether it be George Harrison or Richard Wagner–is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of the fact that they were utilizing the He's So Fine theme. However, they in fact were, for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical* except for one phrase. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B.

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came

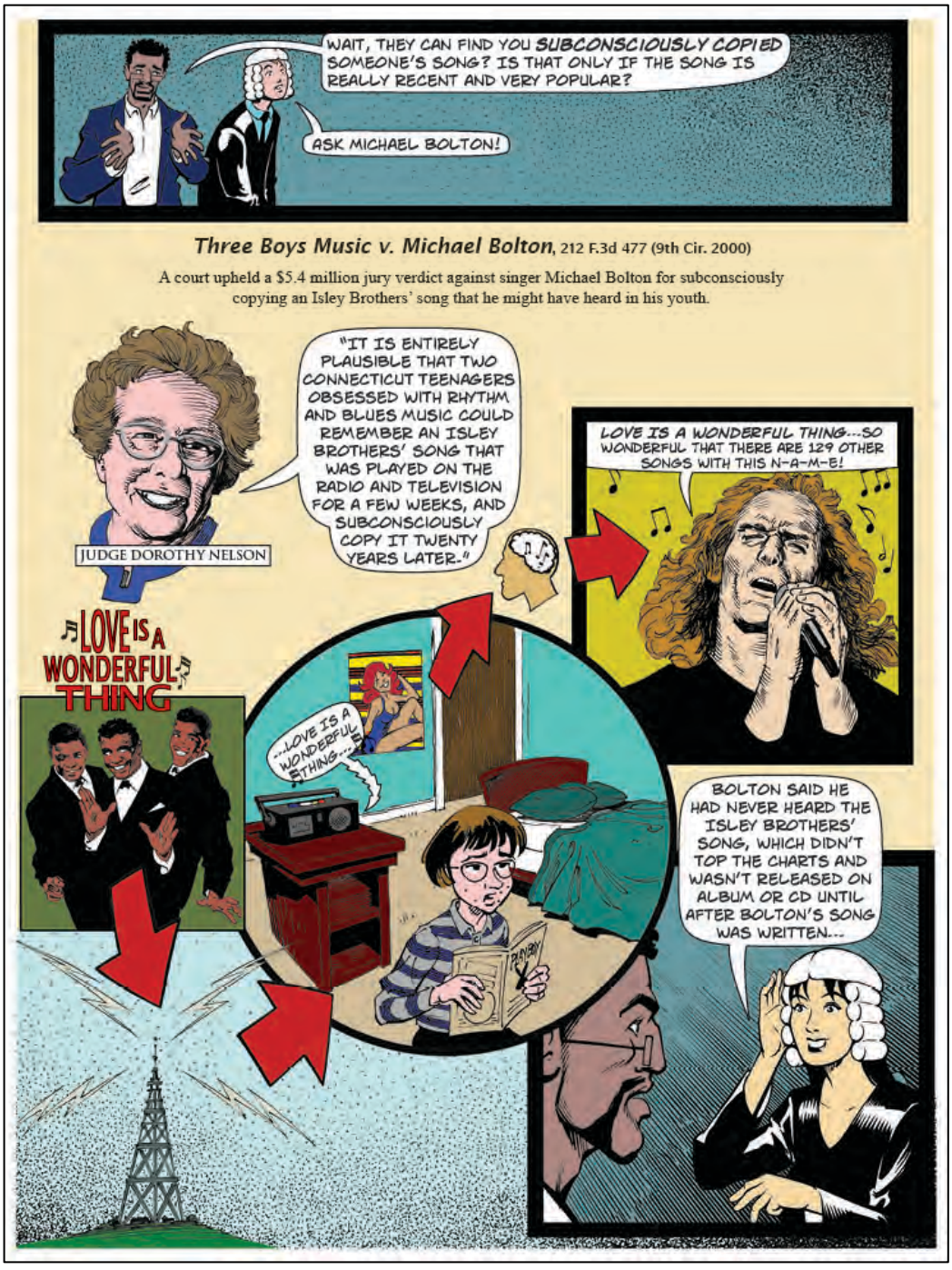
to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.

(* Author's note: musicologists have disagreed with the assessment that the songs are "virtually identical" because the motifs have different harmonies and rhythms.)

This decision was appealed, and the higher court affirmed it. One of the questions in the appeal was whether the conclusion that Harrison subconsciously copied was too much of a stretch, given the time lapse between when Harrison heard "He's So Fine" and when he wrote "My Sweet Lord." After all, part of the reason Judge Hand thought that Jerome Kern must have copied from "Kalua" was the "short" time span between the two songs: probably less than a year. By contrast, Harrison's access to "He's So Fine" was six years before the collective "germinating" began for "My Sweet Lord." The appeals court decided that this six-year gap was acceptable, in part because "the similarity was so striking."

3) *Three Boys v. Bolton* (2000)

From George Harrison, we now move on to Michael Bolton. In 1991, Bolton had a hit song called "Love Is A Wonderful Thing." He was sued for infringing the copyright in a 1964 song by the Isley Brothers, also called "Love Is A Wonderful Thing." Here is a comic book illustration of the case.


WAIT, THEY CAN FIND YOU SUBCONSCIOUSLY COPIED SOMEONE'S SONG? IS THAT ONLY IF THE SONG IS REALLY RECENT AND VERY POPULAR?
ASK MICHAEL BOLTON!
Three Boys Music v. Michael Bolton, 212 F.3d 477 (9th Cir. 2000)
A court upheld a $5.4 million jury verdict against singer Michael Bolton for subconsciously copying an Isley Brothers' song that he might have heard in his youth.
JUDGE DOROTHY NELSON
"IT IS ENTIRELY PLAUSIBLE THAT TWO CONNECTICUT TEENAGERS OBSESSED WITH RHYTHM AND BLUES MUSIC COULD REMEMBER AN ISLEY BROTHERS' SONG THAT WAS PLAYED ON THE RADIO AND TELEVISION FOR A FEW WEEKS, AND SUBCONSCIOUSLY COPY IT TWENTY YEARS LATER."
LOVE IS A WONDERFUL THING---SO WONDERFUL THAT THERE ARE 129 OTHER SONGS WITH THIS N-A-M-E!
LOVE IS A WONDERFUL THING
...LOVE IS A WONDERFUL THING...
BOLTON SAID HE HAD NEVER HEARD THE ISLEY BROTHERS' SONG, WHICH DIDN'T TOP THE CHARTS AND WASN'T RELEASED ON ALBUM OR CD UNTIL AFTER BOLTON'S SONG WAS WRITTEN...

Listen to the songs

As you can see, this case featured a different theory of "access" than the previous two cases. "Dardanella" and "He's So Fine" were both popular songs that were played enough that they could plausibly have lodged in the defendants' memories, and Harrison admitted to

hearing "He's So Fine." By contrast, "Love Is A Wonderful Thing," unlike other hit songs by the Isley Brothers, was not a success—it never topped the charts or even broke the top 100 for a single week, three rhythm and blues experts said they had never heard of it, and it was not released on album or CD until after Bolton wrote his song. So the theory was that Bolton and his fellow songwriter, Andrew Goldmark, *might* have heard it on the radio or television in 1966, when they were thirteen and fifteen, because they grew up in Connecticut listening to rhythm and blues music. But there was no conclusive evidence showing that they actually had an opportunity to hear that particular song—for example, a "TV Guide" from 1966 suggested that the television shows that played the song never aired where they grew up. And even if they had heard the song, this would have been twenty-four years before they wrote the new song (in 1990), a gap much longer than the six-year interval in the George Harrison case. As the court acknowledged: "Indeed, this is a more attenuated case of reasonable access and subconscious copying than [the Harrison case]." Nevertheless, as you read in the comic excerpt, Judge Nelson postulated:

> Teenagers are generally avid music listeners. It is entirely plausible that two Connecticut teenagers obsessed with rhythm and blues music could remember an Isley Brothers' song that was played on the radio and television for a few weeks, and subconsciously copy it twenty years later.

The similarities between the songs were also very different from the "identical" ostinatos or "striking" recurrence of Motifs A and B in the earlier cases. They consisted of:

> [A] combination of five unprotectible elements: (1) the title hook phrase (including the lyric, rhythm, and pitch); (2) the shifted cadence; (3) the instrumental figures; (4) the verse/chorus relationship; and (5) the fade ending.

As this quote indicates, these elements are "unprotectible" by copyright when standing alone, falling short of the copyright eligibility requirements we covered in Chapter Four. The copyright claim was based on the recurring *combination* of all five elements. Given that titles are not subject to copyright—in fact, when this case was going on, there were 129 songs called "Love Is a Wonderful Thing" registered with the Copyright Office—and several of the elements are basic songwriting techniques, these are not the kinds of similarities that necessarily point to copying, as opposed to coincidence.

Why did the judge rule against Bolton? Part of the reason is that, unlike the prior cases, this dispute had already gone to a jury, who issued a verdict against Bolton and Goldmark. Courts are deferential to jury determinations. Therefore, although the judge notes that "we might not reach the same conclusion as the jury regarding access," she explains: "Given the difficulty of proving access and substantial similarity, appellate courts have been reluctant to reverse jury verdicts in music cases." Even though this decision was "predicated on judicial deference," however, by letting the jury verdict stand, it broadened the circumstances in which songwriters might be liable for subconscious copying.

6.3 A FACTUAL INFERENCE

So there you have it: the answer to the question posed earlier—"Can you break the law by copying something *subconsciously*?"—is "Yes." What is the rationale behind the subconscious copying theory? What are some of the concerns that it raises? Let's break it down.

First, in these subconscious copying cases the courts are making a **factual inference that there *must* have been copying, even if it was subconscious.** In Chapter Five, we covered the "factual copying" inquiry—did the defendant copy from the plaintiff, or did they come up with the music themselves? Subconscious copying goes a step further, adding another layer of inference about the *mechanism* of copying: did the defendant copy from the plaintiff… *subconsciously*? This question is tricky because we cannot know what happened in the defendant's mind—even they do not know.

You can probably imagine a scenario where you would conclude that subconscious copying had occurred. If I write a song with the same intricate melody as a recent song by my favorite artist, you might presume that I copied it, even though I am certain I came up with it myself. What evidence of "access" and "similarity" have the courts found sufficient to support an inference of subconscious copying? You are now familiar with the music cases answering this question. Here is a chart comparing the relevant evidence.

Case	Evidence of Access	Time Gap from Access to New Creation	Degree and Nature of Similarity
Fisher (1924)	Jerome Kern had "certainly often heard" the plaintiff's song	"Only a short time before"– probably under a year	Background ostinatos were identical and served the same musical function
Bright Tunes (1976)	George Harrison admitting to hearing the plaintiff's song	Six years earlier	Motifs were "virtually identical except for one phrase" (but had different harmonies)
Three Boys (2000)	Inconclusive evidence whether Michael Bolton and Andrew Goldmark heard the plaintiff's song as teenagers	Twenty-four years earlier	Similarities consisted of a combination of five otherwise non-copyrightable features, many of them generic

Notice how the evidence has become increasingly attenuated. The reach of subconscious copying has been expanded well beyond its roots in the *Fisher* case. This is problematic because the more remote the alleged access, the more likely it becomes that the composer never heard the earlier song, or that it has escaped their memory. And the fewer or more

generic the similarities, the more likely that they are the product of coincidence, and convergent musical culture, rather than copying.

The inference of subconscious copying also rests on at least two key assumptions.

Assumption #1: A model of how musical memory works. The psychological basis for the subconscious copying theory is a memory phenomenon called cryptomnesia, defined by the American Psychological Association as happening when "people mistakenly believe that a current thought or idea is a product of their own creation when, in fact, they have encountered it previously and then forgotten it." (Although as illustrated by the Paul McCartney story, songwriters often wonder whether a melody was original, or copied from somewhere else, rather than immediately believing it was original.) While cryptomnesia describes the end result of subconscious copying—mistakenly thinking your creation is original—it does not fully explain the process by which such copying might actually occur. This is where Assumption #1 comes in.

The cases you have just read envision a mental process in which a songwriter stores music in their subconscious memory that then surfaces intact during the composition process and is copied. But studies suggest that this is not how musical recollection works, particularly as more time lapses between access and copying. There is a growing body of cognitive research both on memory and on how music affects the brain. This research shows that musical memory is complex and imperfect—if you try to remember a song you heard in the past, sometimes you can faithfully replicate it, but often your mind introduces "distortions and confabulations." (See Daniel Levitin, *This Is Your Brain on Music* (2006).) You might change a cadence here, or "fill in the blanks" with extra notes there. What's more, memory degrades over time, increasing the possibility of such distortions.

Note that these observations deal with the *conscious* attempt to recall a particular song. The workings of the subconscious are even murkier. It is by no means clear whether or how the subconscious might retrieve, from a lifetime of music lodged in a songwriter's memory, a specific, intact combination of notes—or other musical features—from a single song.

Assumption #2: A simplified creative process. What about the last step in the process envisioned above, when the songwriter inadvertently copies music from their memory? Does this reflect the realities of writing music?

Consider the story of how George Harrison created "My Sweet Lord." It began with "vamping some chords," then "germinated" collectively through singing along with a group, and then developed through the contributions of the pianist Billy Preston in the recording studio, "under circumstances that Harrison was utterly unable to recall." In footnotes to the *Bright Tunes* decision, the judge acknowledges that "Preston may well have been the 'composer' of motif B and the telltale grace note," but concludes "I treat Harrison as the composer, although it appears that Billy Preston may have been the composer as to part. Even were Preston the composer as to part, this is immaterial."[13] This led to the strange result that

[13] As discussed earlier, the law focuses on the form in which the song is "fixed"—here, that was the lead sheet with Harrison listed as composer, and that is why he was the person being sued for copyright infringement. Billy Preston was credited as a performer rather than composer.

Harrison was found liable for subconsciously copying music—including the "telltale grace note" in the same place in both recordings—that may actually have originated from the mind of another person, Billy Preston. In one way, this makes sense. Harrison is the one with the copyright, after all, and thus the person who is going to be sued. But in another way it shows how tenuous the psychological basis for the theory is. How can we confidently conclude that Harrison subconsciously copied when we are not even sure who came up with the musical phrases in question?

The *Three Boys* case also involved a collaborative process. Both Michael Bolton and his fellow songwriter, Andrew Goldmark, were named as defendants, and they wrote "Love Is A Wonderful Thing" together. Some of the evidence of access focused only on Bolton, and some of it focused on both Bolton and Goldmark. There was also evidence that a third person, the arranger Walter Afanasieff, contributed two of five unprotectible elements that were allegedly copied. The jury concluded that there was subconscious copying (in theory by both Bolton and Goldmark, as co-authors) without addressing the complexities of whose subconscious copied what.

Many songs are written organically, interactively, and iteratively, with numerous contributors who may or may not ultimately be credited as "authors." In these situations, to find subconscious copying, we have to substitute a simplified version of the creative process, and sidestep the thornier questions of how the songs were actually written.

6.4 PROVING AN UNKNOWN

In addition to these inferences and assumptions, there is a **legal rule about burdens of proof**. We have just discussed the factual question of whether subconscious copying happened at all. The second issue is, if we do decide that it happened, should this be illegal?

Liability for subconscious copying extends the general rule in copyright law that infringement follows from the *act* of copying and resulting harm to the copyright owner, rather than the *intent* or motivations of the copier. As explained by the appeals court in the *Bright Tunes* case: "'innocent copying' can nevertheless constitute an infringement… It is settled that '[i]ntention to infringe is not essential under the [Copyright] Act.'" One of the reasons for this rule is the concern that it would be too difficult for plaintiffs to have to prove defendants' intent. Again quoting from the *Bright Tunes* appeal: "as a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders."

So the law tries to ensure that it is not unduly challenging for copyright holders to meet their "burden of proof" in order to recover for copyright infringement. By lifting this burden from the plaintiff, however, the law effectively places it on the defendant, who has to *disprove* subconscious copying by establishing that they "independently created" their song. This burden is difficult to overcome. As discussed above, the law allows for inferences and assumptions to show that there *was* subconscious copying. It does not offer a similar route to prove that there *was not*. Both Harrison and Bolton provided evidence about their

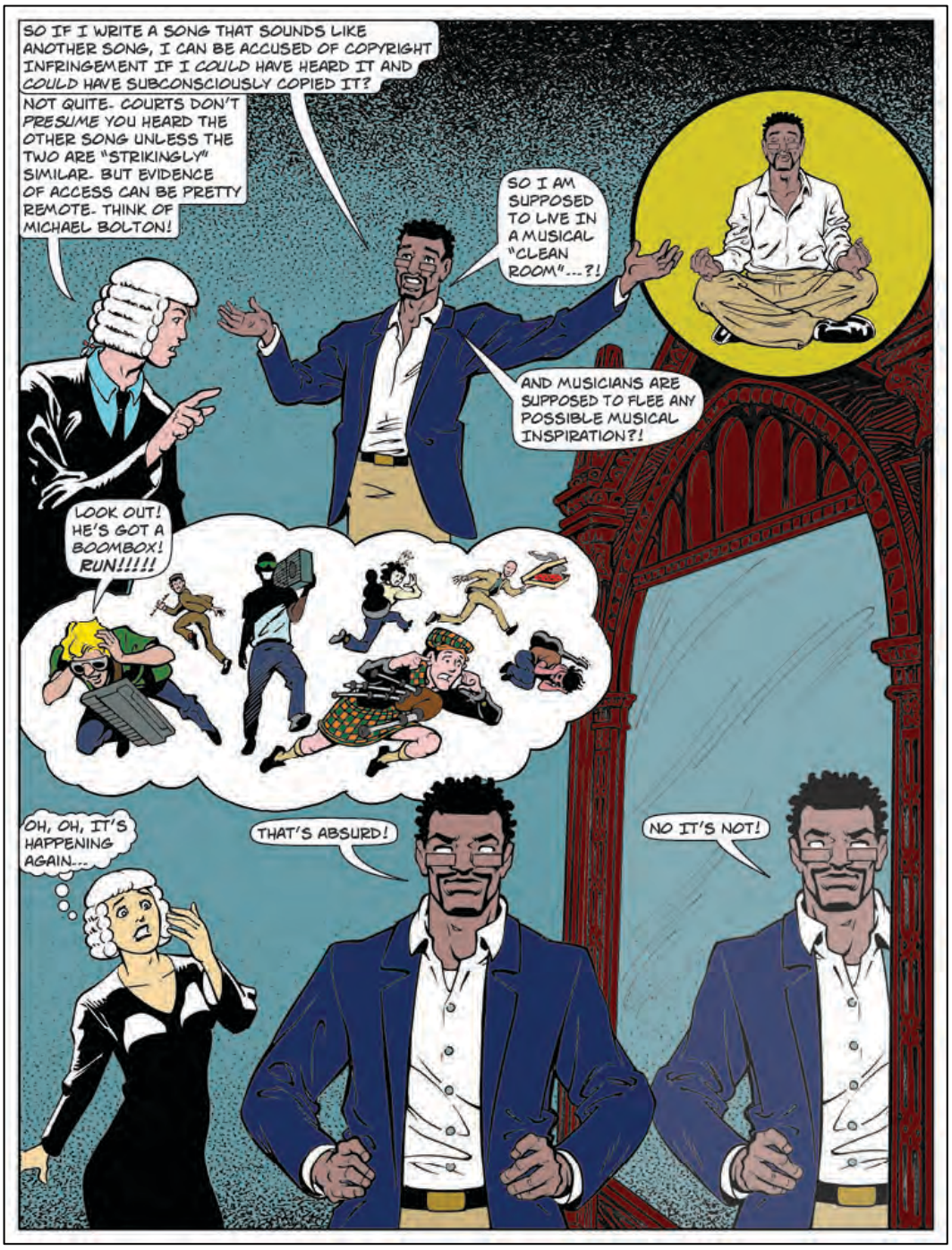
songwriting process that was intended to show independent creation. But, of course, they could not show what was going on in their subconscious. You have already read the story about how "My Sweet Lord" was written; the judge did not think that it demonstrated independent creation. In the Bolton case, Bolton and Goldmark provided a recording called a "work tape" showing how they wrote "Love Is A Wonderful Thing." Unfortunately for them, it backfired: there was a moment when Bolton asked Goldmark if they might be channeling Marvin Gaye's "Some Kind of Wonderful," suggesting to the jury that Bolton was "contemplating the possibility that the work he and Goldmark were creating, or at least a portion of it, belonged to someone else."

What's at stake for musicians? The subconscious copying theory is intended to benefit artists, by allowing them to claim infringement even when copying is not deliberate. The ultimate goal is to bolster creativity. But what if it has the reverse effect?

Think back to the Paul McCartney story that began this chapter. Like McCartney, many songwriters will draw on their subconscious, as well as their own genius, when writing music. And those who love music are especially likely to have a wealth of material stored in their memories. As discussed in Chapter Four, similarities are commonplace in music, due to the limited available vocabulary and the constraints of genre and tradition. If songwriters take seriously the possibility that they could be liable for subconscious copying when such similarities appear,[14] this could have a chilling effect, especially for well-versed musicians. Remember from Chapter One Anita constantly hears music in her head, and has done so for as long as she can remember—how might the prospect of liability for subconscious copying affect her songwriting process?

How might musicians feel about all of this? Artists are potentially on both sides of a legal dispute—as plaintiffs claiming copying, and as defendants accused of it. Are musicians better off being able to recover for subconscious copying, even if they might be liable for it themselves? Or are they better off being free to copy subconsciously, even though this means that others are also free to inadvertently borrow from them? Let's ask our conflicted character from the comic book. Here are his alternate personalities, contemplating both possibilities.

[14] Even though there are only a handful of cases addressing subconscious copying in detail, people in the music business still have to operate within the framework that those cases set out. As noted in Chapter Seven, only a tiny percentage of copyright disputes makes it to the point where there is a legal opinion. Most are resolved through private agreements, using the rules in the published opinions as guidance.


SO IF I WRITE A SONG THAT SOUNDS LIKE ANOTHER SONG, I CAN BE ACCUSED OF COPYRIGHT INFRINGEMENT IF I COULD HAVE HEARD IT AND COULD HAVE SUBCONSCIOUSLY COPIED IT?
NOT QUITE- COURTS DON'T PRESUME YOU HEARD THE OTHER SONG UNLESS THE TWO ARE "STRIKINGLY" SIMILAR- BUT EVIDENCE OF ACCESS CAN BE PRETTY REMOTE- THINK OF MICHAEL BOLTON!
SO I AM SUPPOSED TO LIVE IN A MUSICAL "CLEAN ROOM"...?!
AND MUSICIANS ARE SUPPOSED TO FLEE ANY POSSIBLE MUSICAL INSPIRATION?!
LOOK OUT! HE'S GOT A BOOMBOX! RUN!!!!!
OH, OH, IT'S HAPPENING AGAIN...
THAT'S ABSURD!
NO IT'S NOT!

IF JUDGES DIDN'T PRESUME COPYING IN CASES LIKE THIS, ANYONE COULD GET AWAY WITH RIPPING OFF MY MUSIC BY CLAIMING TO HAVE WRITTEN IT INDEPENDENTLY!
OH, IT'S YOUR MUSIC NOW!? AND YOU'RE WILLING TO RUN THE RISK THAT SOMEONE COULD ACCUSE YOU OF RIPPING THEM OFF? EVEN WHEN YOU DIDN'T?
MY GENIUS IS UNIQUE---
---AND UNRELATED TO MUSIC YOU'VE HEARD BEFORE? NOT LIMITED BY GENRE AND TRADITION SO IT MIGHT SOUND SIMILAR? YEAH, I'M SURE---
IT'S COMPLICATED---
IT'S COMPLICATED---
THIS IS SCARY. I AM KIND OF LIKING THESE MOMENTS NOW.

6.5 RECALIBRATING THE BALANCE?

The challenge for copyright law is to apply the subconscious copying theory in a way that upholds copyright protection without stifling creativity. As the comic excerpt concluded, "it's complicated." Because we are dealing with an unknown, we have to make

our best guess about whether the songwriter's mind has "played on them a trick" and they unwittingly "invaded the author's rights," or whether any similarities are instead the result of coincidence and independent creation, or borrowing from someone other than the plaintiff. Tip the balance too far one way and artists do not have recourse against copying unless it is intentional. Tip the balance too far the other way and artists are held accountable for copying when it is equally plausible that they wrote the music themselves. This could suppress the very creative activity that copyright is intended to encourage.

The law is not static, and, as you have seen, the subconscious copying theory has evolved since its inception. Courts have presumed subconscious copying based on increasingly speculative evidence of access and similarity, and once this presumption is made, it is difficult for the songwriter to rebut it. This raises the concern that the balance has tipped too far in one direction, exposing songwriters to unreasonable liability and encroaching on independent creation.

Given the difficulties of premising copyright liability on the workings of an artist's memory (see the Assumptions covered previously), perhaps we should proceed with caution. Copyright commentators have proposed a number of ways to recalibrate the balance. First, a finding of subconscious copying could be limited to circumstances where there is solid evidence supporting it—for example, concrete evidence that the defendant had access to the plaintiff's work shortly before the alleged copying, and similarities between the two songs that strongly suggest copying, such as the recurrence of complex or unusual "musical fingerprints" from the earlier piece, rather than more generic features that appear in many other songs. Second, the defendant could be allowed to disprove copying more readily, through work tapes demonstrating independent creation, or by showing that they were influenced by music other than the plaintiff's work. Other countries that allow recovery for subconscious copying, such as the United Kingdom, follow these kinds of approaches.

Finally, since our best guess about subconscious copying could nevertheless be wrong, commentators have proposed limiting the penalty for such copying. In fact, in the original *Fisher* case, Judge Hand awarded the smallest possible penalty for infringement, explaining, in his characteristic prose: "The controversy is 'a trivial pother', a mere point of honor, of scarcely more than irritation, involving no substantial interest… However, [the law] fixes a minimum of $250, which is absolute in all cases . . . Therefore I must and do award that sum as damages." By contrast, the award in the Harrison case was $1.6 million (though the eventual payouts were complicated by an unusual backstory[15]) and the award in the Bolton case was $5.4 million.[16]

[15] It turned out that Harrison's former business associate Allen Klein, without telling Harrison, had purchased the rights to "He's So Fine"—the song Harrison was being sued for copying—and worked behind the scenes to increase the damage award. So after Harrison lost, the initial $1.6 million award was reduced to $587,000 and Klein was ordered to transfer the rights to "He's So Fine" to Harrison for $587,000 plus interest, thus allowing Klein to "break even" on his purchase.

[16] In certain circumstances, the Copyright Act allows for lower damage awards when infringement is proven to be unintentional: "In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200." However, this reduction of damages is optional, and only applies to something called "statutory"

SUMMARY

This chapter investigated the notion of subconscious copying, one of the most interesting and controversial aspects of music copyright law. It combines factual inferences based on available evidence with legal ideas about "burdens of proof," and rests on assumptions about how the mind works. Its application has expanded over time. The subconscious copying theory is worth revisiting today because cognitive research may have thrown some of its scientific assumptions into question, and because its reach may now expand ever further—not because of legal cases, but because of the way we listen to music. These days, we have potential exposure to a vast amount of music available on streaming services; much more music than artists could realistically have gained "access" to in the past. Does this mean that artists could now be liable for *subconsciously* copying from all of that music? In the music streaming era, how do defendants prove they did *not* copy from one of these songs? How do plaintiffs show that their song *was* copied? We are still in the world of circumstantial evidence, because direct evidence such as search histories may be unreliable or unavailable, and gathering it would raise privacy concerns. As you will see in Chapter Eight, the law has not yet answered these questions.

The next two chapters will turn to the way three landmark lawsuits have answered the broader questions that we have encountered throughout this book: how do we draw the line between what kinds of musical elements can, and cannot, be owned? And when music *is* owned, when does copying it become infringement? Chapter Seven will offer a deep dive into the first of these cases: the famous "Blurred Lines" lawsuit by the heirs of Marvin Gaye against Pharrell Williams and Robin Thicke. There you will get to see how judges and juries, and musical experts, try to distinguish between benign influence and malign copying.

damages, where the damage amount is set by the statute. It does not apply to the kinds of damage awards in the Harrison and Bolton cases, which were "actual" damages calculated based on the harm to the plaintiff and profits that the defendant gained from the infringement, rather than a set amount.

7
Blurring the Lines

Inside this chapter

7.1 "GOT TO GIVE IT UP" v. "BLURRED LINES" 167
7.2 THE APPEAL 174
7.3 A CAUTIONARY TALE 175
7.4 THEORY AND PRACTICE 177
7.5 IS THERE A "TEXT" IN THIS COURTROOM? 179
7.6 MUSICAL "CONSTELLATIONS" 181
7.7 FINE-TUNING THE ANALYTICAL COMPARISON 186

In Chapter Six, we covered liability for subconscious copying. This concluded our survey of the legal doctrines that come into play when determining whether or not there is copyright infringement between similar sounding songs. (In Chapter Nine, we will turn to the cases involving digital sampling—when we are not just dealing with songs that sound similar, but with the copying of *recorded* sound that is then incorporated into another work.) It is now time to see how some of those doctrines have been applied in famous cases.

Between 2015 and 2022, three high-profile music copyright cases—involving the songs "Blurred Lines," "Stairway to Heaven," and "Dark Horse," respectively—took center stage, making headlines and rocking the music industry. Each shifted the line between what could, and could not, be owned. What follows in the next two chapters is a deep dive into this trio of cases—offering a backstage pass to the twists and turns of each lawsuit. You will have the opportunity to see how disputes involving similar-sounding songs actually play out in practice, and revisit many of the themes from previous chapters. Note that all of these cases involved only the © *composition* copyright because the defendants did not use the actual sounds from a particular recording.

Let's begin our tour with the "Blurred Lines" case.

7.1 "GOT TO GIVE IT UP" v. "BLURRED LINES"

The song "Blurred Lines" was known for many things. It was the world's best-selling single in 2013. Its lyrics and music video were extremely controversial. And it was also the

subject of a copyright lawsuit that, yes, blurred the lines between what counts as permissible inspiration, and impermissible theft.

"Got to Give It Up" was written by Marvin Gaye, a legendary songwriter and performer. Like "Blurred Lines," it was a hit song, reaching #1 on Billboard's Hot 100 chart in 1977. Gaye died in 1984, and his copyrights passed on to his heirs. The Gaye heirs claimed that Pharrell Williams and Robin Thicke—the authors of "Blurred Lines"[17]—illegally copied from "Got to Give It Up." In 2015, a jury found them guilty of copyright infringement.

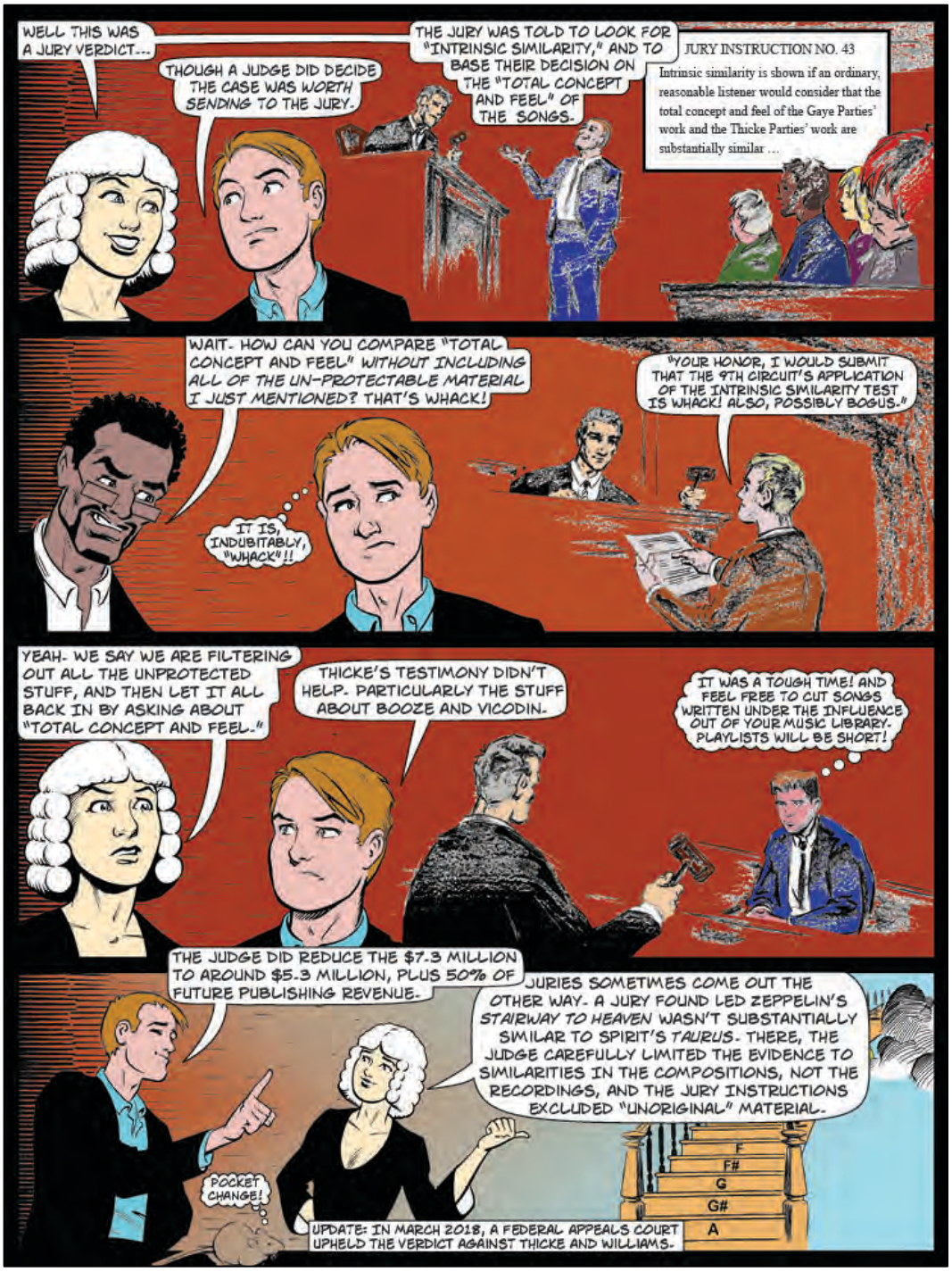
Here is the story of that lawsuit in comic book form.

SO IF YOU ARE ALL SO SMART, HOW COME PEOPLE SAY OUR SONG "BLURRED LINES" IS ILLEGAL?
THEY SAY WE VIOLATED MARVIN GAYE'S COPYRIGHT OVER "GOT TO GIVE IT UP"!
I'M A HUGE MARVIN GAYE FAN! I KNOW BOTH OF THOSE SONGS- THEY DO SOUND SIMILAR, BUT THAT'S BECAUSE...
OH, THAT SONG- WITH THE MESSED-UP LYRICS- AND SUCH A "CLASSY" VIDEO-
...I WAS CHANNELING THAT LATE '70S FEELING!! IS IT ILLEGAL TO EVOKE A GROOVE?
SO, WHAT DOES COPYRIGHT LAW SAY?

[17] The Gaye heirs initially sued the rapper T.I. (Clifford Harris, Jr.), another co-author of "Blurred Lines," as well, but because T.I. wrote the rap part of the song rather than the music, he was not ultimately liable for infringement.

WELL, FIRST, THIS ISN'T ONE OF THOSE SAMPLING CASES INVOLVING THE "SOUND RECORDING" RIGHT- IT'S JUST ABOUT THE MUSICAL COMPOSITION-
GOT TO GIVE IT UP
UNDER THE LAW, SOME OF THE THINGS THAT MAKE THE SONGS SOUND SIMILAR – THE COWBELL, THE PARTY NOISE, THE FALSETTO – AREN'T PART OF THE "COMPOSITION" BECAUSE THEY WEREN'T IN THE SHEET MUSIC- SO THEY'RE OFF THE TABLE-
SO THE REGULAR RULES APPLY---
I'VE GOT THIS!
SURE, THERE ARE SIMILARITIES BETWEEN THE SONGS- BUT LOTS OF SONGS SOUND THE SAME- IT'S ONLY COPYRIGHT INFRINGEMENT IF "BLURRED LINES" TOOK ENOUGH COPYRIGHT-PROTECTED MATERIAL FROM "GOT TO GIVE IT UP" TO MAKE THE SONGS SUBSTANTIALLY SIMILAR-

LIKE YOU SAID, WE'RE ONLY TALKING ABOUT THE COMPOSITION, SO THINGS LIKE THE COWBELL AREN'T LEGALLY RELEVANT.
COWBELL ALWAYS RELEVANT! 'MORE COWBELL,' I SAY!!
COPYRIGHT DOESN'T COVER ANYTHING THAT ISN'T "ORIGINAL" - MARVIN GAYE GOT A COPYRIGHT OVER WHAT HE CREATED- NOT THE STUFF HE BORROWED FROM OTHER SONGS.
YEAH, LIKE THE STUFF FROM JOHNNIE TAYLOR'S "DISCO LADY" - GAYE USED THAT!
AND COPYRIGHT DOESN'T COVER "SCÈNES À FAIRE." ALL OF THOSE DEFINING STOCK ELEMENTS OF FUNK, DISCO, OR MOTOWN...MARVIN GAYE, PHARRELL WILLIAMS, MARK RONSON, EVEN MILEY CYRUS WOULD BE FREE TO BUILD UPON THEM.
MILEY CYRUS?!
MOST OF WHAT MAKES THE SONGS SOUND SIMILAR IS STUFF THE LAW LEAVES FREE! WHAT'S LEFT ARE SCATTERED, MARGINAL SIMILARITIES- NO COPYRIGHT INFRINGEMENT!
OH YEAH? A JURY SAID WE OWED OVER $7.3 MILLION FOR COPYRIGHT INFRINGEMENT!
OK, WHAT HAPPENED THIS TIME?


WELL THIS WAS A JURY VERDICT...
THOUGH A JUDGE DID DECIDE THE CASE WAS WORTH SENDING TO THE JURY.
THE JURY WAS TOLD TO LOOK FOR "INTRINSIC SIMILARITY," AND TO BASE THEIR DECISION ON THE "TOTAL CONCEPT AND FEEL" OF THE SONGS.
JURY INSTRUCTION NO. 43
Intrinsic similarity is shown if an ordinary, reasonable listener would consider that the total concept and feel of the Gaye Parties' work and the Thicke Parties' work are substantially similar ...
WAIT- HOW CAN YOU COMPARE "TOTAL CONCEPT AND FEEL" WITHOUT INCLUDING ALL OF THE UN-PROTECTABLE MATERIAL I JUST MENTIONED? THAT'S WHACK!
IT IS, INDUBITABLY, "WHACK"!!
"YOUR HONOR, I WOULD SUBMIT THAT THE 9TH CIRCUIT'S APPLICATION OF THE INTRINSIC SIMILARITY TEST IS WHACK! ALSO, POSSIBLY BOGUS."
YEAH- WE SAY WE ARE FILTERING OUT ALL THE UNPROTECTED STUFF, AND THEN LET IT ALL BACK IN BY ASKING ABOUT "TOTAL CONCEPT AND FEEL."
THICKE'S TESTIMONY DIDN'T HELP- PARTICULARLY THE STUFF ABOUT BOOZE AND VICODIN.
IT WAS A TOUGH TIME! AND FEEL FREE TO CUT SONGS WRITTEN UNDER THE INFLUENCE OUT OF YOUR MUSIC LIBRARY- PLAYLISTS WILL BE SHORT!
THE JUDGE DID REDUCE THE $7.3 MILLION TO AROUND $5.3 MILLION, PLUS 50% OF FUTURE PUBLISHING REVENUE-
POCKET CHANGE!
JURIES SOMETIMES COME OUT THE OTHER WAY- A JURY FOUND LED ZEPPELIN'S STAIRWAY TO HEAVEN WASN'T SUBSTANTIALLY SIMILAR TO SPIRIT'S TAURUS- THERE, THE JUDGE CAREFULLY LIMITED THE EVIDENCE TO SIMILARITIES IN THE COMPOSITIONS, NOT THE RECORDINGS, AND THE JURY INSTRUCTIONS EXCLUDED "UNORIGINAL" MATERIAL-
F
F#
G
G#
A
UPDATE: IN MARCH 2018, A FEDERAL APPEALS COURT UPHELD THE VERDICT AGAINST THICKE AND WILLIAMS-

WELL, LIKE I SAID, I'M A HUGE GAYE FAN. AT LEAST HIS HEIRS GOT SOMETHING...
YOU KNOW WE'VE GOT TO FIND A WAY TO BRING SOME UNDERSTANDING HERE TODAY...
THEY COPIED "GOT TO GIVE IT UP" AND THE JURY HEARD IT! ...RIGHT NOW, I FEEL FREE. FREE FROM...PHARRELL WILLIAMS AND ROBIN THICKE'S CHAINS AND WHAT THEY TRIED TO KEEP ON US AND THE LIES THAT WERE TOLD.
IT SPEAKS VOLUMES ABOUT WHO WE ARE AS A COUNTRY THAT, NO MATTER WHO YOU ARE, IF YOU DO SOMETHING WRONG THERE ARE CONSEQUENCES.
NONA GAYE
RICHARD BUSCH (the Gayes' lawyer)
SO I UNDERSTAND THE IMPULSE TO SYMPATHIZE WITH HIM. I DO THINK THEY SHOULD MAYBE HAVE CREDITED HIS INFLUENCE...
BUT THAT DOESN'T MEAN THERE WAS COPYRIGHT INFRINGEMENT! WAS THIS VERDICT GOOD FOR MUSIC?
WELL IT PROMPTED SOME STRONG REACTIONS FROM MUSICIANS AND COMMENTATORS...
LA WEEKLY Great. Now "Blurred Lines" Has ruined the entire music industry
The Washington Post It's okay if you hate Robin Thicke. But the 'Blurred Lines' verdict is bad for pop music.
Slate Squelching Creativity
THE NEW YORKER Why the "Blurred Lines" copyright verdict should be thrown out
Chicago Tribune 'Blurred Lines' copyright verdict creates bad law for musicians
#CHILLINGEFFECTS?

I DON'T THINK IT'S A STEAL FROM MARVIN GAYE. I THINK THAT THE GROOVE IS VERY SIMILAR BUT YOU HAVE TO REMEMBER HE IS A BIG FAN OF MARVIN GAYE'S SO THAT'S OKAY. BUT IT'S NOT THE SAME SONG.
IT STILL BAFFLES ME THAT THAT CASE WENT THE WAY THAT IT DID. HOPEFULLY SOMEDAY IT WILL GET OVERTURNED AND AN ASPIRING SONGWRITER WON'T FEEL AS THOUGH THEY CAN'T EMULATE THEIR HEROES.
ADAM LEVINE
STEVIE WONDER
YOU DON'T WANT TO GET INTO THAT THING WHERE ALL OF US ARE SUING EACH OTHER ALL THE TIME BECAUSE THIS AND THAT SONG FEELS LIKE ANOTHER SONG. I'M A LITTLE CONCERNED THAT THIS VERDICT MIGHT BE A SLIPPERY SLOPE.
JOHN LEGEND
THE JURY'S VERDICT...TAKES WHAT SHOULD BE FAMILIAR ELEMENTS OF A GENRE, AVAILABLE TO ALL, AND PRIVATIZES THEM.
IF THIS WERE TO BECOME A STANDARD, IT'S GOING TO BE ONE OF THE GREATEST GROWTH INDUSTRIES OF ALL TIME, SUING PEOPLE WHO SOUND LIKE SOMEONE ELSE.
PROFESSOR CHRISTOPHER SPRIGMAN
PROFESSOR E. MICHAEL HARRINGTON
SO WHAT DO YOU TWO THINK?
THE VERDICT HANDICAPS ANY CREATOR OUT THERE WHO IS MAKING SOMETHING THAT MIGHT BE INSPIRED BY SOMETHING ELSE. IF WE LOSE OUR FREEDOM TO BE INSPIRED, WE'RE GOING TO LOOK UP ONE DAY AND THE ENTERTAINMENT INDUSTRY AS WE KNOW IT WILL BE FROZEN IN LITIGATION.
I KNOW THE DIFFERENCE BETWEEN INSPIRATION AND THEFT. YOU CAN'T HELP BUT BE INSPIRED BY ALL OF THE GREATNESS THAT CAME BEFORE YOU. IN POPULAR MUSIC, YOU KNOW, THERE'S ONLY SO MANY CHORDS BEING USED.
PHARRELL WILLIAMS
ROBIN THICKE

COPYRIGHT IS SUPPOSED TO LEAVE ROOM FOR MUSICIANS TO BUILD ON THEIR INSPIRATIONS. I'M FEELING LESS CONFIDENT ABOUT THAT NOW.
ME TOO. WHAT'S BORROWED HERE IS A FEEL. LIKE I SAID BEFORE, NO INFRINGEMENT!
COPYRIGHT'S RULES – SUCH AS "SCÈNES À FAIRE" – TRY TO DRAW A LINE BETWEEN CREATIVE FREEDOM AND INFRINGEMENT.
BUT VERDICTS LIKE THIS COULD LEAD TO...
BLURRED LINES!

Listen to the songs

7.2 THE APPEAL

Williams and Thicke appealed the verdict to the Ninth Circuit Court of Appeals, which ruled against them in 2018. The judges in the case disagreed on what the right answer was. The **majority** opinion "affirmed" the verdict. That is legal language for saying that the lower

court's decision was correct. Interestingly, it did not decide the case on the basis of musical similarities between the songs. In other words, the appeals court did not say "yeah, we've listened to them and you were right!" Rather, it emphasized the need to defer to the decisions that the jury had made in that case. This happens in the law. Sometimes courts essentially retry a case all over again. But on other occasions, they do not second guess the first set of decisionmakers so long as the decision seems reasonable. In this case, the court set a pretty low threshold for what counted as reasonable: "one simply cannot say truthfully that there was an absolute absence of evidence supporting the jury's verdict in this case." It also based its decision on the fact that Williams' attorneys had failed to file the right legal documents earlier in the case. In lawyer-speak, the majority focused on "procedure"—the rules about how cases should be decided, rather than "substance"—what the case is actually about.

The **dissenting** opinion criticized the majority for refusing to address the music at issue, and warned about the verdict's implications for musicians, and even the Gayes themselves. This is from the opinion was written by Judge Jacqueline Nguyen:

> The majority allows the Gayes to accomplish what no one has before: copyright a musical style. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere… The Gayes, no doubt, are pleased by this outcome. They shouldn't be. They own copyrights in many musical works, each of which (including "Got to Give It Up") now potentially infringes the copyright of any famous song that preceded it.

In response, the majority downplayed the significance of its holding. Judge Milan Smith wrote: "Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as **a cautionary tale for future trial counsel wishing to maximize their odds of success**." In other words, future lawyers will remember to file the paperwork that Williams' lawyers omitted.

With the appeal decided, the "Blurred Lines" case was over. But its aftermath continued.

7.3 A CAUTIONARY TALE

Whether or not the case was a "cautionary tale" for lawyers, it was certainly one for the music industry. It created ripple effects that affected everything from the songwriting process itself, to musicians' income streams, to how songs were vetted and released.

As predicted, it led to a surge of copyright infringement claims. Unfortunately, some of the lawsuits being filed had little legal merit. This is unfair both to the people being sued *and* to other plaintiffs with meritorious claims, because it dilutes the legitimacy of such lawsuits. In *Rolling Stone* magazine, columnist Amy X. Wang summarized the impact of the "Blurred Lines" case:

> Most of the world knows Robin Thicke, Pharrell Williams, and T.I.'s "Blurred Lines" as a half-forgotten hit song from 2013. The music industry remembers it as

its worst nightmare… Across genres, artists are putting out new music with the same question in the backs of their minds: **Will this song get me sued?**

*The New York Time*s pop music critic Jon Caramanica described "**a climate of fear**" among musicians, and explained the disconnect between these lawsuits and how music is created: "Pop music isn't made in a vacuum. Copying isn't always bad. And a new trend pulling more pop stars into courtrooms is a dangerous one… Every song benefits from what preceded it, whether it's a melodic idea, a lyrical motif, a sung rhythm, a drum texture. A forensic analysis of any song would find all sorts of pre-existing DNA." For Caramanica, cases like "Blurred Lines" effectively "demand[] that each song be wholly distinct from everything that preceded it, an absurd and ultimately unenforceable dictate."

It's definitely changing the way people are doing things. A lot of times, if you're not getting inspiration right away, we'll listen to stuff to get inspired. In all the rooms I'm working in now, people are much more self-conscious about that.

—Bonnie McKee, songwriter for Katy Perry, Kelly Clarkson, Christina Aguilera, Britney Spears

Artists grew increasingly wary about building on their inspirations. They wondered whether the inevitable similarities between songs—whether because they were in the same style or genre, or because they happened to have some of the same notes and chords—could now land them in court. And in the wake of the "Blurred Lines" verdict, they were uncertain about how a jury might rule. The law was encroaching on their creativity.

I shouldn't be thinking about legal precedent when I am trying to write a chorus.

—E. Kidd Bogart, songwriter for Beyoncé, Rihanna, Madonna

In an article entitled "'Blurred Lines' on Their Minds, Songwriters Create Nervously," Ben Sisario, who covers the music industry for *The New York Time*s, explained how professional songwriters in particular were "second-guessing" themselves: "The aftereffects of the 'Blurred Lines' decision—which was upheld on appeal last year—have been felt most acutely by rank-and-file songwriters, who work in obscurity even as their creations propel others to stardom."

By eliminating any meaningful standard for drawing the line between permissible inspiration and unlawful copying, the judgment is certain to stifle creativity and impede the creative process.

—Legal brief signed by 212 musicians, from Jennifer Hudson to Fall Out Boy to the bands Earth, Wind & Fire and The Go-Gos

This "anxiety of influence"[18] had effects that extended beyond the creative process. The hit song "Uptown Funk," as its name suggests, was influenced by funk music. It initially had six songwriters. After "Blurred Lines," it has eleven writers—in response to a copyright claim, the five authors of The Gap Band's funk anthem "Oops Upside Your Head" were added to the "Uptown Funk" credits.

More musicians began taking out expensive insurance policies to pay for possible litigation. Music companies hired musicologists to vet songs before release. And, rather than going through a lawsuit, they preemptively added the writers of similar-sounding songs to songwriting credits, making them co-authors who share in the proceeds from the new song. This is often referred to as an "interpolation" credit. (An interpolation echoes elements from another song without copying from the actual *sound recording* of that song. When the sound recording is copied, this is called "sampling.") While this trend may be welcome for the authors of the earlier songs, it can confound copyright's notion of "authorship" when artists are made co-authors of songs they played no role in creating, and it also means that the writers of the new song have to share their already dwindling royalties[19] with an increasing number of co-authors.

Some authors can better afford this than others. Beyoncé's 2022 album *Renaissance* prompted a fresh discussion about whether people are being overly cautious in adding co-authors when it may not be legally necessary. Intriguingly, the list of writers for the song "Break My Soul" initially included the names of the songwriters from the 1990s dance hit "Show Me Love." Those names were later removed, and then added back again.[20] Many listeners noticed only a vague homage to the synthesizer hook in the earlier song, rather than something that would cross the line into copyright infringement. Another instance of proactive profit sharing occurred in 2021, when Olivia Rodrigo gave members of the band Paramore a writing credit for "good 4 u" because of similarities between that song and Paramore's "Misery Business." Many commentators questioned whether this move was legally warranted. Other examples abound—if you encounter stories about them, you can listen to the clips at Whosampled.com and decide for yourself whether you think there were substantial similarities and whether co-authorship status makes sense.

7.4 THEORY AND PRACTICE

The "Blurred Lines" verdict was disruptive in part because it was inconsistent with the underlying law. Reacting to the verdict, singer-songwriter Keith Urban told People magazine: "I was shocked, honestly. Seems more like a sound and a feel and a style and a genre and an era, none of which can be copyrighted." Urban is right—no one can copyright

[18] A reference to Harold Bloom, "The Anxiety of Influence: A Theory of Poetry" (1973).
[19] As you will read in Chapter Twelve, many songwriters have seen declining royalties in the music streaming era.
[20] The homage was welcomed by Robin S, who sang "Show Me Love," but was not one of the songwriters so was not eligible for co-authorship. She told *Vulture*: "It is our job and our duty as veterans to teach the younger generation how to get it done and get it done your way…The younger generation takes it to a different level. And that's what she's done…Beyoncé thought of me enough to be a part of my legacy, so that I could be a part of her legacy. That's the gift that keeps on giving."

a style. That principle has not changed. Copyright's doctrines such as originality, idea/expression, and scènes à faire, covered in Chapter Four, are supposed to allow anyone to conjure a particular style. But here theory was out of sync with practice. So, how did the jury conclude that there was copyright infringement? What happened?

As mentioned in the comic, it is possible that the jury had negative feelings toward Robin Thicke, who had lied to the press about his role in writing "Blurred Lines," then had to admit during the litigation that Pharrell Williams actually "wrote almost every single part of the song." Thicke blamed alcohol and Vicodin for the inconsistency. Another possible skew was something called the "inverse ratio" rule, which said that if there was a high degree of "access" to an earlier song, then a lower showing of similarity was required to prove copyright infringement. In other words, the more that I can show you heard my song, the less similar yours needs to be in order to infringe my copyright. This had the effect of penalizing artists like Williams, who acknowledged familiarity with Gaye's song. As you will see in the next chapter, the Ninth Circuit Court of Appeals has now officially rejected this rule, but it was still governing law during the "Blurred Lines" case.[21]

At the heart of this case was a more direct problem: the application of both the "analytical" and "listening" parts of the "substantial similarity" test ushered in unprotectable material.

As you read in the comic, when **listening** to the songs to determine "intrinsic" similarity, the jurors were instructed to compare the songs' "**total concept and feel**." Doing so will inevitably include uncopyrightable material—by definition, "concept" encompasses ideas, and "feel" encompasses stylistic elements. It will not surprise you to learn that the "total concept and feel" standard is controversial—a better formulation would not explicitly invite the comparison of unprotectable material.

The inherent vagaries of the listening comparison, even without the "total concept and feel" standard, means that the **analytical comparison** of the songs serves an important gatekeeping function. This is when copyrighted material is sifted from uncopyrightable material. If there is no "extrinsic" similarity between *protected* elements of the two songs, there is no copyright infringement, and no need to proceed to the listener test. Music experts are the guides to the analytical comparison—they are hired by both sides to "dissect" and compare the songs. In the "Blurred Lines" trial, the **expert testimony** ended up allowing a wide range of unprotectable material—including stylistic features—to seep into the jury's determination.

We now turn to this testimony, which provides a fascinating illustration of the indeterminacy of 1) what a musical composition consists of in the first place, and 2) what kinds of musical similarities suggest copyright infringement.

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[21] Interestingly, when affirming the jury verdict in this case, the Ninth Circuit changed its mind about whether to address the "inverse ratio" rule. As described by the court in the Led Zeppelin case that we will cover in Chapter Eight: "In *Williams v. Gaye*...the majority initially defended use of the rule against the dissent's criticism because the rule is 'binding precedent' that 'we are bound to apply.' But in an amended opinion, the court deleted all references to the rule."

7.5 IS THERE A "TEXT" IN THIS COURTROOM?[22]

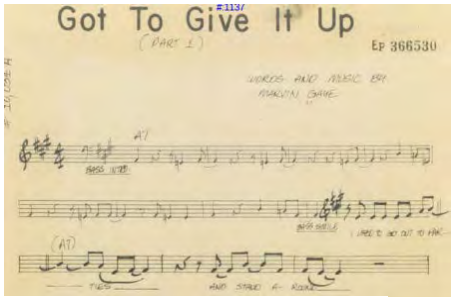
As you read in Chapter Five, courts have described the analytical comparison of musical compositions as "a somewhat unnatural task, guided by relatively little precedent." At the outset, there is often no definitive representation of the music itself. With a book or film or painting, there is a particular instantiation of the "work." With music, however, there may be contrasting visual transcriptions and audio renditions of the composition in question. In addition, what you "see" may bear little relation to what you "hear."

Fixation Redux

Before sound recordings existed, music was fixed on paper. Copyright law held onto this method of fixation for a *long* time. Until 1978, the metes and bounds of a composition were established by the manuscript deposited with the Copyright Office—called a "deposit copy"—because at the time they only accepted sheet music, not recordings. Because "Got to Give It Up" was copyrighted in 1977, it was subject to that outdated rule.

Limiting an artist's musical composition to what was written down was unfair to artists who did not work in written traditions, or whose contributions were more stylistic or performance-based and did not translate naturally to notation. Chapter Thirteen will discuss the inequities caused by this requirement in more detail.

A hotly debated question in this case was whether, as a legal matter, Gaye's copyright only covered what was within the four corners of the deposit copy. The appeals court decided that it did not need to resolve this legal question. During the litigation Gaye's copyright was not confined to the manuscript after all, because the expert testimony went beyond it.



An excerpt from the "Got to Give It Up" lead sheet (Figure 7.1)

In the "Blurred Lines" case, because "Got to Give It Up" was an older song, it appeared that the scope of Marvin Gaye's composition might be limited to the "lead sheet" on file with the Copyright Office. ("Lead sheets"—as in "take the lead" rather than as in the heavy metal—are simplified notations of songs, generally consisting of the melody, lyrics, and harmony that is often indicated by chord abbreviations such as the "A7" in the "Got to Give It Up" lead sheet; Figure 7.1.) This would have been unfair to Gaye, because he—like many musicians—created music by playing it, not writing it down. The lead sheet was notated by someone else, and did not reflect his full composition. The sidebar above provides an explanation of why the lead sheet was consulted; it hearkens back to our discussion about "fixation."

However, during the trial, the Gayes' experts offered testimony about similarities that they thought were "implied" by the manuscript even though they were not notated. The jury

[22] A reference to Stanley Fish, "Is There A Text in This Class? The Authority of Interpretive Communities" (1982).

was invited to look at transcriptions showing musical elements beyond what was on the lead sheet. The jury also heard multiple audio versions of "Got to Give It Up." They did not hear the commercial sound recording, because it contained a range of "performance" elements such as the cowbell, falsetto, and party noises that were subject to the separate sound recording copyright.[23] But they *did* hear a redacted version of the sound recording, and three mash-ups prepared by the Gayes' expert that layered Marvin Gaye's vocals onto the music in "Blurred Lines" and vice versa. Those mash-ups added in both compositional material that was not in the lead sheet and performance elements such as Gaye's vocals. In other words, the expert created mashups that made the songs sound quite similar. Some of these similarities came from Marvin Gaye's performance. Because of the way music copyright separates the material covered by the composition and sound recording rights, those features were outside the scope of the Gayes' composition copyright. Critics raised concerns that this could prejudice the jury, perhaps leading them to say there was copyright infringement, when some of the things that made the songs sound similar were common performance elements in the genre.

Note that the debate about what was part of Gaye's composition necessarily accepts copyright's ©/℗ divide because that is the law we have. Whether this ©/℗ structure actually makes any sense for music is a separate question that was addressed at the end of Chapter Four. In an ideal world, what *should* be considered part of Gaye's composition? On the one hand, we *want* to reward Gaye for his full output and it might seem fairer to include his stylistic contributions and the way he performed "Got to Give It Up" within the composition umbrella. But such an approach could have the unintended consequence of disadvantaging just the artists we want to benefit—the Marvin Gayes of the world—because they could then be sued for sounding too similar to other artists who could also claim ownership of these kinds of elements.

Returning to the expert testimony in this case: as we discussed in Chapter Four, **the indeterminacy of what music *is* means that an expert's analytical comparison of two songs—what is owned and what is not, what similarities are musically meaningful—is not tethered to an authoritative musical "text," or even an authoritative audio recording.**

Most of us experience music by listening to it. But, in court, the analytical dissection of songs requires visualizing and describing it, as you will see in the following examples. Think about the job of a translator. They have to choose what words to use to faithfully move from one language to another. Should they use slang? Use a different figure of speech if the original does not work? Expert witnesses are music's translators. Sometimes the musicological analysis is refracted through a distorted lens. The plaintiff's expert will typically amplify similarities, and the defendant's expert will amplify differences. This can be confusing for jurors, who are not generally music experts—in fact, attorneys for both sides

[23] Under copyright law those elements would not have been part of the composition, however it was fixed. As you read in the comic, material covered by the sound recording right was not relevant in this case because Williams did not use Gaye's sound recording.

often remove potential jurors who have musical backgrounds. Those who do end up on the jury are faced with dueling comparisons that employ unfamiliar language and notation. Imagine a copyright lawsuit claiming that one book infringes another book, but the jurors deciding the case cannot read the language in those books. They are presented with conflicting expert depictions of what the books actually say and are then asked to decide whether those books are substantially similar. That is what music copyright cases can be like.

7.6 MUSICAL "CONSTELLATIONS"

This leads us to the expert testimony in this case. Because the melody, harmony, and structure of "Got to Give It Up" and "Blurred Lines" were different, the copyright claim was based on what the Gayes' expert described as a "constellation" of more isolated similarities. These portions of the songs were presented both visually and through various audio renderings.

Here is your opportunity to see the actual testimony from a music copyright case. What are your reactions? Do the transcriptions faithfully represent the *music* at issue? How would you describe the nature of the similarities between the songs?

1) Signature phrases. The most prominent part of this "constellation" was what the expert called the "signature phrase" in each song. The music in question accompanied "I used to go out to parties" in Gaye's song and "And that's why I'm gon' take a good girl" in Williams' song.

Listen to the clips, keeping in mind that the commercial sound recordings include elements that were not part of Gaye's composition and therefore were not relevant to the infringement inquiry.

Figures 7.2 and 7.3 are the transcriptions from the Gayes' expert. *Reassuring note*: some of you will be able to read music. Others will not. You do not have to read music to understand the points being made here! In fact, if you don't, then you will be in the same position as the jury. That is part of the point.

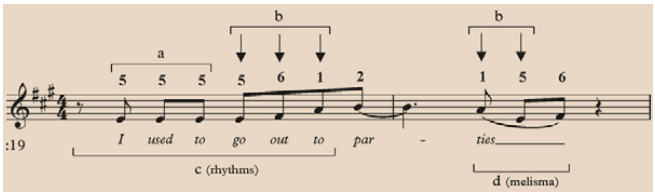


Figure 7.2 Signature phrase in "Got to Give It Up"

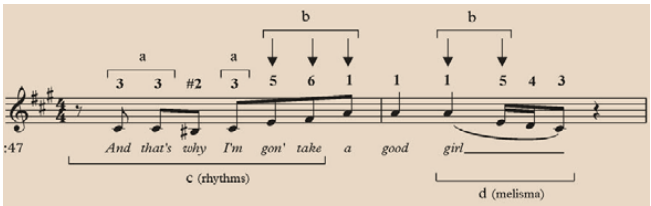


Figure 7.3 Signature phrase in "Blurred Lines"

This kind of visualization is frequently used in music copyright cases. Overlays such as numbers, arrows, and brackets are added to the notation to indicate similarities. However, many of these highlighted similarities can be overstated or taken out of their musical context.

The relevant similarities are designated by the letters "a" through "d":

a) Both phrases begin with repeated notes
b) Both contain a 5–6–1 scale degree sequence in the first measure followed by 1–5 in the second measure
c) Both begin with a rhythm of six eighth notes
d) Both use a "melisma" (a word or syllable held over multiple pitches) at the end that begins with the scale degrees 1–5

Williams' expert countered with a different transcription showing that the "signature phrases" shared only one note – highlighted – with the same pitch and placement, and that even the one shared note had a different rhythm (Figure 7.4).

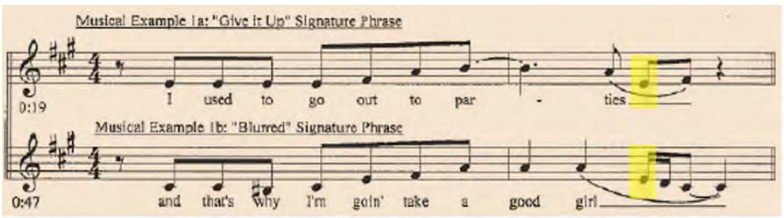

Musical Example 1a: "Give It Up" Signature Phrase
0:19
I used to go out to par - ties
Musical Example 1b: "Blurred" Signature Phrase
0:47
and that's why I'm goin' take a good girl

Figure 7.4 Comparison of signature phrases

This visualization emphasizes differences between the songs. However, limiting the focus to the highlighted note could understate relevant similarities, as they do not always occur on identically placed pitches.

She argued that all of the four similarities identified above were commonplace, and that there were important differences between the songs in harmony, pitch or scale degree, rhythm, and placement of the notes. Here is a summary of her argument:

a) It is common for songs to repeat a note at the beginning of a phrase—examples include "Catch a Falling Star." ("Happy Birthday" is another example.) In addition, the "repeated notes" in the two songs are actually different: "Got to Give It Up" repeats a note four times, whereas "Blurred Lines" repeats a note twice, followed by a different note, followed by the first note.
b) 5–6–1 and 1–5 are common pitch sequences because 1 is the most stable note in a scale, 5 is the second most stable, and 6 is commonly used to move between 5 and 1 when a melodic phrase occurs over a major chord. (As shown in Figure 7.5, there are only 7 degrees in a major scale.) In addition, these are isolated sequences that occur at different places in the two signature phrases, as part of different overall melodic phrases, and they are accompanied by different chords.

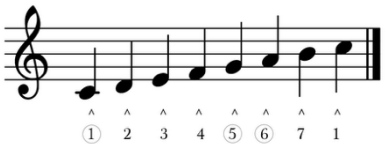


Figure 7.5

c) A rhythm of six eighth notes is also common. Chuck Berry's "Johnny B. Goode," the Beatles' "Hard Day's Night," and War's "Low Rider" all contain six or more eighth notes in a row.
d) Using a melisma at the end of a lyrical phrase is also a common musical device or "idea," as in the Beatles' "Hard Day's Night," where the word "dog" is sung

over a three-note melisma in the lyric "and I've been working like a dog." ("Happy Birthday, dear ____," also uses a melisma when the name of the person is one syllable, because it is sung over two notes.)

2) Hook phrases. The next similarity identified by the Gayes' expert was what she called the "hook phrases." They consisted of four notes. Figure 7.6 shows the transcriptions:

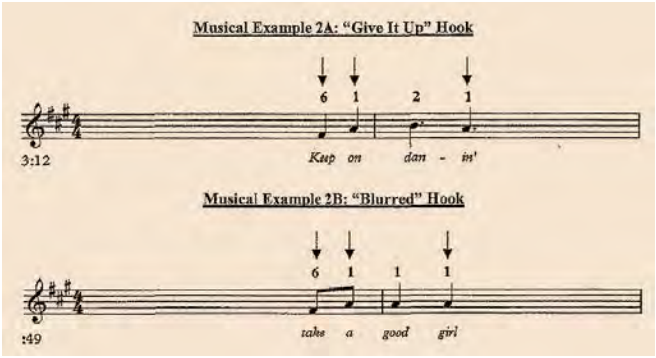


Figure 7.6

Williams' expert with the transcription given in Figure 7.7, with the most distinctive difference highlighted:

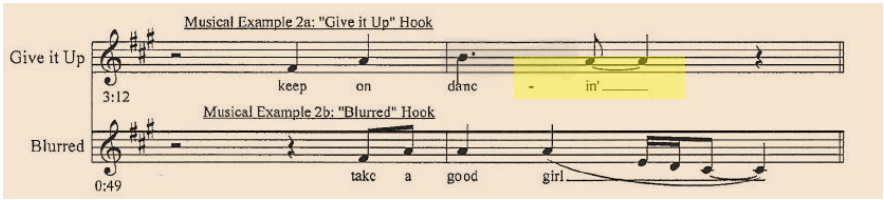


Figure 7.7

As you can see, only three of the four notes are the same, and those three notes have different rhythms, placements, and neighboring notes. The underlying harmonies of these phrases were not the same, and structurally the phrases occurred during different parts of the songs—in "Got to Give It Up" the phrase was during a fade out at the end of the song, while in "Blurred Lines" it occurred during the chorus in the middle of the song.

The signature phrases and hook phrases were both parts of the songs' *melodies*. What did you think of these comparisons? **What kinds of melodic similarities are musically meaningful**? Here is some guidance from ten musicologists, who signed on to a brief supporting Williams' appeal of the jury verdict:

> Melody is typically the most distinctive, and memorable musical aspect of a popular song, because that is what listeners can most readily comprehend, recall and replicate. Melodic lines comprise pitches sounded for particular durations. No one can claim to own a three or four-note sequence, or a mere rhythmic pattern, without reference to the particular pitches, their durations, and their metric placements in the measures. It is only the combination of pitches and rhythms that constitutes melody.

These musicologists expressed concern about the way the Gayes' testimony divorced the pitch sequences from their musical context:

> To allow one person to monopolize short, simple, and non-identical melodic snippets would cause uncertainty and impinge on creative freedom…. [The Gayes'] melodic comparisons presented *non-corresponding* portions of the melodies of the two works and distorted the duration and placement of notes in their presentation. But when the melodies in question are aligned as they are actually notated, their melodies and harmonies are demonstrably unrelated… Nobody would find two literary works similar simply because an expert moved around words, paragraphs and punctuation.

Explaining why they filed a brief in this case, the musicologists said they were worried that the verdict "would curtail creativity in the field of popular music, inhibiting songwriters by the threat of far-fetched claims of infringement bolstered by speculative and misleading musical testimony."

3) Nonmelodic similarities. Beyond the melody lines, the "constellation" of similarities also included relatively generic **chords, bass notes, and musical techniques**. Overall, the songs' keyboard parts and bass lines were different. But the keyboard part in "Got to Give It Up" contained an A7 chord, and the keyboard part in "Blurred Lines" had an A chord—standard harmonies for both songs, which were in the key of A. And both songs' bass lines used the first scale degree, or the "root" note of the chord—this is one of the most common bass notes in popular music. The two songs also employed some of the same music devices such as "word painting" (where the music illustrates the lyrics, such as singing "higher" to ascending pitches) and "parlando" (rapping in the middle of a song). These are akin to "ideas," and are not copyrightable.

Taking everything together, this is how the dissenting judge in the appeal characterized these similarities:

> The Gayes' expert…cherrypicked brief snippets to opine that a 'constellation' of individually unprotectable elements in both pieces of music made them substantially similar. That might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these 'constellations' is that they're both compositions of stars… Her analysis is the equivalent of finding substantial similarity between two pointillist paintings because both have a few flecks of similarly colored paint.

Or, as described by an article in *Variety* magazine, this "'constellation of similarities'…was seen by many—including many musicologists—as hocus-pocus, but it persuaded the jury."

When can you own a musical "constellation"? As you have seen, the constellation of similarities in this case consisted of bits and pieces of uncopyrightable material. One of the Gayes' claims was that, even if anyone is free to use a 5-6-1 pitch sequence or repeated eighth notes or an A chord, "Blurred Lines" infringed the "Got to Give It Up" copyright because it copied the "combination" of the elements in the constellation. This raised the legal question: **When does the recurrence of a *musical combination* amount to infringement?**

Under copyright law, even if individual elements are not copyrightable, an author can still own a particular *combination* of those elements, if they are "**selected**" and/or "**arranged**" in an **original** way. However, the copyright extends only to the way the material was chosen and put together—anyone can still use the underlying material. In addition, if there is a limited number of ways to combine that material, then the combination has what is called "**thin copyright**," because it only contains a minimal degree of creativity. In that case, only "**virtually identical**" combinations would violate the copyright.

Outside of the context of music, these rules are often applied to things such as compilations, when an author compiles uncopyrightable facts in an original way. Simply putting facts in chronological or alphabetical order would not be original, but more creative choices in selecting and arranging factual material could qualify for copyright. An illustration is below.

Copyright in compilations

Let's say that Barry makes a chart ranking the best colleges for students who love music. For each college he shows relevant classes, local music venues, college radio stations, and alumni who pursued careers in music. He also includes some idiosyncratic indicia such as average rainfall and the furriness of school mascots. Despite his painstaking research on everything from alumni to weather patterns, he does not own any of the facts he compiles. But, if he exercised sufficient originality, he *can* own the way he chose and organized this data. So, while Calandra can copy any of the information Barry compiled, she cannot duplicate Barry's overall chart.

Extending copyright to *musical* combinations presents special challenges. Many songs will share the same combinations of generic material, whether because the songs are evoking the same style, or because, at a more general level, they are just using basic musical building blocks. With books, you would not find copyright infringement when one author uses the same combination of "articles, pronouns, prepositions, and adjectives also used by others."[24] But music has a different vocabulary. The nature and role of individual elements—a particular sequence of notes, a rhythm, a chord progression, a melisma—and the significance of their collective recurrence is not as clear. Musicological guidance is necessary to distinguish original and distinctive combinations from those that are routine and unremarkable.

In the "Blurred Lines" case, Williams' lawyers argued that the Gayes' "constellation" fell into the latter category, and that it should have a "thin copyright" because its contents reflected the narrow range of creative choices in music. To be sure, "Got to Give It Up" as a whole is highly creative. But the focus here was on the kind of material identified by the Gayes' expert, not the whole song. If that material was only subject to a thin copyright, there would be no infringement, because the way the various pitch sequences, rhythms, chords,

[24] This quote is from Judge Charles E. Clark, the dissenting judge in a seminal music copyright case against Cole Porter called *Arnstein v. Porter* (1946). Judge Clark was concerned about the implications of overly granular analytical dissection in music.

and techniques manifested in "Blurred Lines" was not "virtually identical." (Quoting the dissenting judge: "Big and Little Dipper they are not.") The "Blurred Lines" appeal addressed this question only obliquely—the majority explained that music, as a general category, is not subject to thin copyright because "musical compositions are not confined to a narrow range of expression," but did not address of the specific similarities at issue.

As you will see, this question of the scope of copyright in musical combinations is directly addressed by both of the cases in Chapter Eight.

7.7 FINE-TUNING THE ANALYTICAL COMPARISON

What can we learn from the "Blurred Lines" case? **How can we ensure that artists remain free to use musical building blocks, including the elements comprising a style, or a feel?** Here are some suggestions.

As explained earlier, the analytical comparison is where these building blocks are filtered out from the substantial similarity analysis. If there is no substantial similarity of protected material, then there is no infringement, and no need to go to a jury. Judges can therefore use the analytical comparison to weed out exaggerated claims before sending them to a jury, where the results are unpredictable—Robin Thicke might turn the jurors against him, or a "battle of the experts" might obfuscate the musical analysis. However, in the Ninth Circuit, which decided the "Blurred Lines" case, judges had become more and more reluctant to decide the cases at the analytical comparison stage. Music cases were being sent to the jury as long as there were "indicia of a sufficient disagreement" between the experts; and, of course, experts from each side would disagree because that was their role. In other words, the courts had downplayed the importance of the first analytical step which, many scholars believed, meant that juries were finding copyright infringement based on uncopyrightable similarities that were simply stylistic conventions or standard building blocks. It is worth noting that, since the "Blurred Lines" decision, judges in the Ninth Circuit appear to have reversed course. As you will see in the next chapter, they are no longer automatically sending cases to the jury for the "listening" phase of the analysis if the case can appropriately be resolved at the level of analytical dissection.

Whoever the decisionmaker, when objectively comparing music, **the expert testimony should help distinguish protected from unprotected material, and adhere to generally accepted musicological guidelines**. This would ensure that the similarities identified are musically meaningful, and that an infringement finding is not unwittingly based upon unprotectable material.

This brings us back to the unusual **attributes of music as an art form**. With books or movies, the work is anchored by the words on the page or images on the screen.[25] You would

[25] This is not to suggest that copyright cases involving other art forms are easy to decide. Quite the contrary. With books or movies, what you see on a page or on a screen is certainly not the end of the story—creative works are subject to varying interpretations, and meaning is not self-evident. With a play or a ballet, the text or labanotation does not reflect the full performance. Other copyrightable subject matter such as photography and software present their own challenges. In all cases it may still be difficult to pinpoint where unprotectable ideas end and where copyrightable expression begins, and to decide whether relevant similarities are

know if a claim was based on "articles, pronouns, prepositions, and adjectives" or if an expert had "moved around words, paragraphs and punctuation." But, as you have seen, there are many ways to represent the same piece of music. The "analytical dissection" will always be at some level of abstraction from the underlying work, and the musical significance of each claim is not self-evident. For the layperson, it is also in a foreign language, replete with notation, numbers, letters, arrows, and terminology that can be employed to emphasize similarities or dissimilarities. Musicians might recognize scattered similarities in two songs as the components of a style, or as dictated by what "sounds good" or basic musical conventions. But to the layperson, those similarities may look "substantial." This puts more pressure on the expert as *translator* to ensure that this testimony is methodologically rigorous. A focus on *quality*—whether the similarities are musically meaningful—is as important as *quantity* (look at all of these matching pitches, rhythms, chords!).

In addition, with expert testimony, **what you "see" should have some relationship to what you "hear."** Musical notation is not an end in itself—it is a set of written instructions about how to produce sound. If the analytical comparison strays too far from how a song *sounds*, it no longer reflects what the music actually *is*. As the musicologists' brief explained, with a melody, what you hear is not determined merely by the sequence of pitches, but by their musical context and function—their duration, metric placement, underlying harmony, neighboring notes, and more. **The whole is, in fact, greater than the sum of its parts.** Unmoored from context, musically *different* material can be shoehorned into a list of similarities—for example, two 5–6-1 pitch sequences with different durations and placements—that are not musically significant.

SUMMARY: BRIGHTER LINES

After the "Blurred Lines" verdict, musicians were anxious for **more clarity** about what they could and could not copy. The brief filed by 212 songwriters in the appeal said: "The law should provide clearer rules so that songwriters can know when the line is crossed, or at least where the line is." As explained above, fine-tuning the analytical process would help provide that clarity, with the **ultimate goal of protecting the original, creative material in Gaye's song, while still allowing musicians—including the next Marvin Gaye—to freely use musical building blocks, such as the defining elements of a style, feel, or groove**.

In the next chapter, we will continue our deep dives with the Led Zeppelin and Katy Perry cases, where you will see courts moving in this direction—jettisoning the longstanding "inverse ratio" rule that artificially lowered the similarity threshold, excluding unprotectable material, and grappling with ways to prevent musical "combinations" from reintroducing generic or unremarkable musical maneuvers.

"substantial." The focus here is on music, and how the attributes of this particular art form impact the copyright analysis. With music, the disparity between the map and terrain is often more pronounced, with both visual and auditory representations more obscure to the layperson and remote from the music.

8

Moving the Needle

Inside This Chapter

8.1 "TAURUS" v. "STAIRWAY TO HEAVEN" 190
8.2 KEEPING BUILDING BLOCKS FREE.....193
8.3 GRAPPLING WITH MUSICAL COMBINATIONS 195
8.4 PERMISSIBLE AND IMPERMISSIBLE BORROWING 197
8.5 "JOYFUL NOISE" v. "DARK HORSE" 200
8.6 WHAT'S IN AN OSTINATO? 201
8.7 THIS OSTINATO ISN'T COPYRIGHTABLE 203
8.8 HAVE WE SEEN THE HIGH WATER MARK?..... 206
8.9 WHAT ABOUT ACCESS? 217

VU Meter by Iain Fergusson (CC BY 2.5)

In the last chapter, we took an in-depth look at the "Blurred Lines" case. This chapter continues our deep dive with some further case studies. We start with a pair of lawsuits against Led Zeppelin and Katy Perry respectively in which the Ninth Circuit Court of Appeals signaled a willingness for judges to step in and ensure that basic musical components—including pitch sequences and combinations of unprotectable material—remain free. Many observers hoped that this meant the end of the "chilling effect" on songwriting that the "Blurred Lines" decision had produced. One set of subsequent victories indicated a promising trend: Ed Sheeran and Dua Lipa both successfully defended lawsuits accusing them of copyright infringement for using commonplace musical elements.

As you will see when we turn to those cases, however, the reality is more complex. Newspaper headlines merely announce who won or lost a case. It is more important to see *why* the defendants prevailed and *when* during the litigation they did so. That point is highlighted by the final case discussed in the chapter, which claims copyright over a beat that is foundational to reggaeton and targets pretty much every commercially successful artist in that genre. Summary judgment has just been denied in that case, meaning that it may be headed to a jury. As you learned in the previous chapter, conflicting testimony from musical experts can make it difficult to resolve such cases at an earlier stage. As a result, even defendants who are rightly confident that they will prevail at trial may settle to avoid the huge expenses of litigation. That, in turn, produces an incentive for more such complaints to be brought in the future. The case studies in this chapter take you through the whole story.

8.1 "TAURUS" v. "STAIRWAY TO HEAVEN"

From "Blurred Lines," we go back in time to a song that was written over forty years earlier: Led Zeppelin's "Stairway to Heaven," one of the most famous rock songs of all time.

As you read in the comic book excerpt, the jury ruled differently in this case: it concluded that there was no infringement. Then the Ninth Circuit Court of Appeals did something different too: in an unusual move, it vacated the jury verdict, even though it has traditionally deferred to juries in music cases. Then, in an even more unusual move, it changed its mind, and vacated *that* decision, granting what is called "*en banc*" review. "En banc" is French for "in bench," and these kinds of rehearings are only granted in exceptional circumstances. While regular Circuit Court appeals are heard by three judges, *en banc* appeals in the Ninth Circuit are heard by an eleven-judge panel. This panel ultimately ruled in favor of Led Zeppelin, who had now won, then lost, then won again.

The final opinion in the case was released in March 2020. It was highly anticipated, because it had the opportunity to clear up some of the confusion that had been lingering since the "Blurred Lines" case. What did the Led Zeppelin decision say? In the next section, you will have the opportunity to hear from the court itself. First, here is some background.

Randy Wolfe, a guitarist in the band Spirit, wrote "Taurus" in either 1966 or 1967. Led Zeppelin released "Stairway to Heaven," written by its members Jimmy Page and Robert Plant, in 1971. While there was no direct evidence that Page and Plant ever heard Spirit perform "Taurus," the two bands did cross paths, performing at the same venue at least three times between 1968 and 1970. The court found that this was sufficient to establish access. Wolfe passed away in 1997, and his copyrights were transferred to the Randy Craig Wolfe Trust. Michael Skidmore became a co-trustee of this Trust in 2006, so that is why Skidmore was the plaintiff in this lawsuit.

Listen to the songs

When you listen to the two songs, their introductions sound quite similar. Thinking back to Chapter Four, are you hearing *compositional* similarities, or similarities resulting from the way the underlying compositions were *performed*? Only the compositional similarities were relevant in this lawsuit because the sound recording of "Taurus" was not copied, and it was actually recorded before there were federal sound recording rights.

Early in the litigation, two of the plaintiff's experts, Dr. Alexander Stewart and Brian Bricklin, had identified similarities in instrumentation and orchestration such as: "the presence of acoustic guitar, strings, recorder/flute sounds, and harpsichord as well as the noticeable absence of bass and drums (and other instruments characteristic of rock and roll) [that] lend both songs a decidedly 'classical' style, particularly evoking a Renaissance atmosphere," and "the use of reverb to create a mystic, dreamlike quality." In 2016, the lower court explained that they were part of Spirit's performance, and not part of the copyrighted composition.

Plaintiff's experts impermissibly relied on performance elements found in the sound recordings. For example, Stewart opined that Stairway to Heaven is substantially similar to recorded versions of Taurus based on common "fingerpicking style," "acoustic guitar," "classical instruments such as flute . . . strings and harpsichord," "atmospheric sustained pads," and "fretboard positioning." Similarly, Bricklin focused almost exclusively on the music production and mixing process to conclude that Taurus and Stairway to Heaven shared a common ethereal ambience created in the production process.

This gives you a sense of the kinds of things that are sometimes considered part of a performance rather than the underlying composition. These features were also excluded for a related reason: as with "Got to Give It Up," "Taurus" was written before 1978, so its copyright was limited by what was on the "deposit copy" given to the Copyright Office. These performance elements were not in the manuscript.

By the time the case got to trial, the compositional similarities between the songs had been distilled to five elements. They were:

- a five-note descending chromatic scale in A minor[26]
- a sequence of half notes and whole notes in the scale
- a melody involving various arpeggios and note pairs[27]
- a rhythm of successive eighth notes (sound familiar?)
- a collection of pitches in distinct proportions

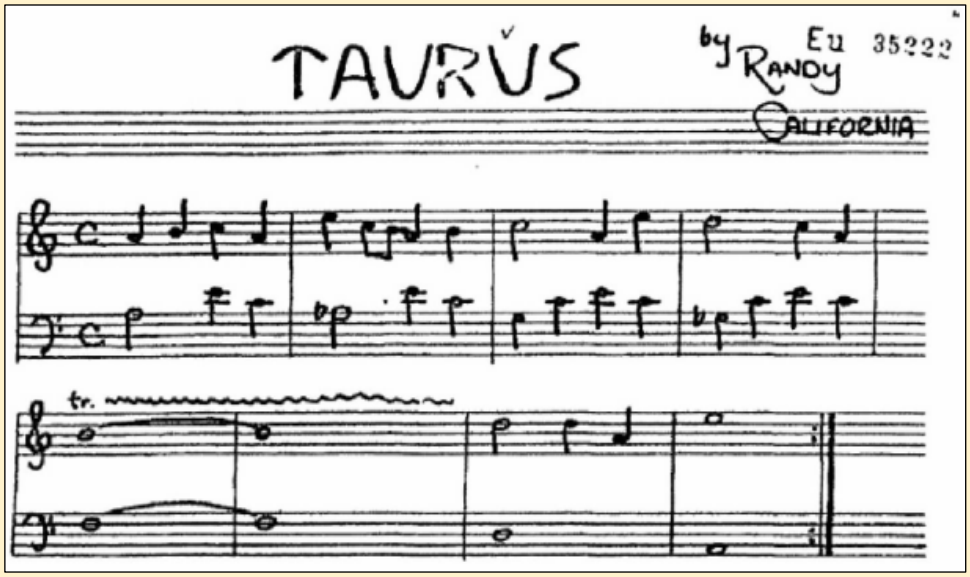
These were the elements at issue in the appeal. With that in mind, let's turn to the court's decision.

In this excerpt, Judge M. Margaret McKeown describes **the music** and the expert testimony in the case.

Stairway to Heaven has been called the greatest rock song of all time. Yet, hyperbole aside, nearly 40 years after the English rock band Led Zeppelin released its hit recording, the song is not impervious to copyright challenges. The estate of guitarist Randy Wolfe claims that Led Zeppelin and its guitarist Jimmy Page and vocalist Robert Plant copied portions of Taurus, a song written by Wolfe and performed by his band Spirit…

Skidmore's claims are not based on the entire Taurus composition. Rather, Skidmore claims that the opening notes of Stairway to Heaven are substantially similar to the eight-measure passage at the beginning of the Taurus deposit copy:

[26] The chromatic scale consists of twelve pitches separated by a half-step. If you play the white and black keys on a piano in succession, that's the chromatic scale.
[27] An arpeggio is when you play the pitches in a chord in succession rather than at the same time.

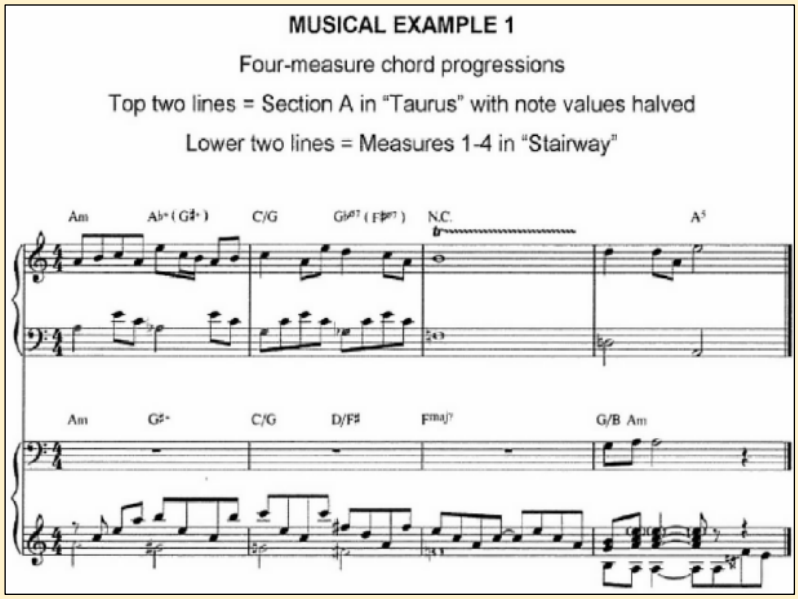


The claimed portion includes five descending notes of a chromatic musical scale. These notes are represented on the piano as a set of adjacent black and white keys, from right to left. The beginning of Stairway to Heaven also incorporates a descending chromatic minor chord progression in A minor. However, the composition of Stairway to Heaven has a different ascending line that is played concurrently with the descending chromatic line, and a distinct sequence of pitches in the arpeggios, which are not present in Taurus…

The substantial similarity question pitted two expert musicologists against each other. Skidmore's expert, Dr. Alexander Stewart, analyzed, one by one, five categories of similarities. Dr. Stewart acknowledged that a chromatic scale and arpeggios are common musical elements. But he found Taurus and Stairway to Heaven to be similar because the descending chromatic scales in the two compositions skip the note E and return to the tonic pitch, A, and the notes in the scale have the same durations. Then he pointed to three two-note sequences–AB, BC, and CF#–that appear in both compositions. In his view, the presence of successive eighth-note rhythms in both compositions also made them similar. Finally, he testified that the two compositions have the same "pitch collection," explaining that certain notes appear in the same proportions in the beginning sequence of both works.

In sum, Dr. Stewart claimed that five musical elements in combination were copied because these elements make Taurus unique and memorable, and these elements also appear in Stairway to Heaven…

Led Zeppelin's expert, Dr. Lawrence Ferrara, testified that the two compositions are completely distinct. To highlight the marked differences in the compositions, he presented the following exhibit, which juxtaposed the claimed portion of Taurus against Stairway to Heaven:



Dr. Ferrara testified that the similarities claimed by Skidmore either involve unprotectable common musical elements or are random. For example, Dr. Ferrara explained that the similarity in the three two-note sequences is not musically significant because in each song the sequences were preceded and followed by different notes to form distinct melodies. He described the purported similarity based on these note sequences as akin to arguing that "crab" and "absent" are similar words because they both have the letter pair "ab." He also testified that the similarity in the "pitch collection" is not musically meaningful because it is akin to arguing that the presence of the same letters in "senator" and "treason" renders the words similar in meaning.

8.2 KEEPING "BUILDING BLOCKS" FREE

After identifying the similarities between the songs, Judge McKeown addressed the question of whether they were eligible for copyright protection. During the trial, the jury had been instructed that copyright "does not protect ideas, themes or common musical elements, *such as descending chromatic scales, arpeggios or short sequences of three notes*." On appeal, Skidmore argued that this instruction was prejudicial against him, because those were just the kinds of musical elements he was claiming to own. In the excerpt that follows, the judge explains why these were "building blocks" that "belong in the public domain."

Although copyright protects only original expression, it is not difficult to meet the famously low bar for originality. Even in the face of this low threshold, copyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. Nor does copyright extend to "common or trite" musical elements or "commonplace elements that are firmly rooted in the genre's tradition." These building blocks belong in the public domain and cannot be exclusively appropriated by any

particular author. Authors borrow from predecessors' works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works…

Despite Skidmore's challenge to the characterization of descending chromatic scales as unprotectable, even his own expert musicologist, Dr. Stewart, agreed musical concepts like the minor chromatic line and the associated chords have been "used in music for quite a long time" as "building blocks." This candid acknowledgement was echoed by Led Zeppelin's expert. Dr. Ferrara described the "chromatic scale, descending or ascending," as "a musical building block. This is something that no one can possibly own." The commonality of descending scales and arpeggios has been reinforced by the Copyright Office, which lists "[d]iatonic or chromatic scales" and "arpeggios" as common property musical material. Emphasizing the importance of original creation, the Copyright Office notes that "a musical work consisting entirely of common property material would not constitute original authorship." Just as we do not give an author "a monopoly over the note of B-flat," descending chromatic scales and arpeggios cannot be copyrighted by any particular composer.

We have never extended copyright protection to just a few notes. Instead we have held that "a four-note sequence common in the music field" is not the copyrightable expression in a song. In the context of a sound recording copyright, we have also concluded that taking six seconds of the plaintiff's four-and-a-half-minute sound recording–spanning three notes–is de minimis, inactionable copying. One of our colleagues also expressed skepticism that three notes used in a song can be copyrightable by observing that of the "only 123 or 1,728 unique combinations of three notes," not many would be useful in a musical composition. The Copyright Office is in accord, classifying a "musical phrase consisting of three notes" as de minimis and thus not meeting the "quantum of creativity" required under *Feist* [*Feist* is the defining Supreme Court case about originality]. At the same time, we have not foreclosed the possibility that "seven notes" could constitute an original expression. To the contrary, our sister circuit observed decades ago that "the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes."

Clearly, descending chromatic scales and arpeggios cannot be owned. Nor can a single note. What about **short sequences of notes**? Citing to both prior cases and the Copyright Office, the judge suggests, in the final paragraph of the previous excerpt, that three notes are not enough to support a copyright claim. (The cases that Judge McKeown refers to are actually the James Newton case you read about in Chapter Four regarding the six seconds "spanning three notes," and Judge Nguyen's dissent in "Blurred Lines" regarding the limited number of three-note combinations that would be "useful.") A four-note sequence might be insufficient as well, at least if it is "common in the music field." And while seven notes *could* be original, their reappearance could also be unremarkable.

8.3 GRAPPLING WITH MUSICAL COMBINATIONS

None of the five elements claimed by Skidmore were copyrightable standing alone. Skidmore argued, however, that the *combination* of elements from "Taurus" was an original "selection and arrangement," and therefore copyrightable in the aggregate. This brings us back to the issue raised in the "Blurred Lines" case about musical combinations. When can such a combination be owned, and what does it take to infringe it? As we discussed, this is a tricky question. Many songs share combinations of unprotectable material with prior works. Does this mean that they are illegal? Here, Judge McKeown tries to offer a "floor," explaining that that not all musical combinations are protectable. In particular, she rejects claims over "random similarities scattered throughout the works" and requires that the elements "cohere to form a holistic musical design."

We have extended copyright protection to "a combination of unprotectable elements ... only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship." Put another way, what a selection and arrangement copyright protects is the particular way in which the artistic elements form a coherent pattern, synthesis, or design.

Skidmore and his experts never argued to the jury that the claimed musical elements cohere to form a holistic musical design. Both Skidmore's counsel and his expert confirmed the separateness of the five elements by calling them "five categories of similarities." These disparate categories of unprotectable elements are just "random similarities scattered throughout [the relevant portions of] the works." Labeling them a "combination" of unprotectable elements does not convert the argument into a selection and arrangement case. Skidmore's selection and arrangement argument fails because a copyright plaintiff "d[oes] not make an argument based on the overall selection and sequencing of ... similarities," if the theory is based on "random similarities scattered throughout the works." Presenting a "combination of unprotectable elements" without explaining how these elements are particularly selected and arranged amounts to nothing more than trying to copyright commonplace elements. Without such arrangement, there is no liability for taking "ideas and concepts" from the plaintiff's work, "even in combination."

Skidmore misconstrues what the copyright law means by a "combination," "compilation," and "selection and arrangement" of unprotectable elements. The word "combination" cannot mean any "set" of artistic building blocks. We have explained that only the "new combination," that is the "novel arrangement," and not "any combination of unprotectable elements ... qualifies for copyright protection." Likewise, a protectable "compilation" is the precise "result[ ]" that is "formed by the collection and assembling of preexisting materials ... that are selected, coordinated, or arranged."

Therefore, a selection and arrangement copyright is infringed only where the works share, in substantial amounts, the "particular," i.e., the "same," combination of unprotectable elements. A plaintiff thus cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant's work, in a different aesthetic context. Because many works of art can

be recast as compilations of individually unprotected constituent parts, Skidmore's theory of combination copyright would deem substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors. We have already rejected such a test as being at variance with maintaining a vigorous public domain.

Not all of the eleven judges on the "en banc" panel agreed with what you have just read. Six signed on to it. Two judges who agreed with other parts of Judge McKeown's decision opted out of this portion. One filed what is called a "concurring" opinion, where the judge agrees with the outcome but wants to offer different reasoning. And two disagreed and filed a dissenting opinion. Clearly the question of musical combinations is a challenging one.

Here is the concurring opinion, in which Judge Paul J. Watford goes further than Judge McKeown in circumscribing copyright for musical combinations that work within a "narrow range of creative choices." He explained that, because of the limited amount of creativity involved, these combinations should only have what is called "thin copyright," meaning that a similar combination in another song would only infringe that copyright if it is "virtually identical." Here is how he applies that test to the five elements in the Led Zeppelin case.

Skidmore contended that Taurus uniquely combined the following features: a five-note descending chromatic scale in A minor; a sequence of half notes and whole notes in the scale; a melody involving various arpeggios and note pairs; a rhythm of successive eighth notes; and a collection of pitches in distinct proportions. None of those elements is subject to copyright protection in its own right; they belong to the public domain from which all musical composers are free to draw.

Skidmore can claim protection for the original selection and arrangement of those elements, but the scope of that protection depends on the "range of possible expression." There are relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical conventions and styles. For instance, once Randy Wolfe settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear).

In light of the narrow range of creative choices available here, Skidmore "is left with only a 'thin' copyright, which protects against only virtually identical copying." In my view, this standard is separate from—and more demanding than—the "substantial similarity" test. As our cases have repeatedly recognized, the substantial-similarity framework applies only to works with broad copyright protection, while the virtual-identity standard governs thin copyrights….

Given the thin protection afforded the selection and arrangement of basic musical elements at issue here, Skidmore could prove infringement only if the relevant passages of Taurus and Stairway to Heaven are virtually identical. They are not. Undeniable and obvious differences exist between the first four measures of both songs: The notes in the melodies are different; the use of the treble clef in conjunction with the bass clef is different; and the rhythm of eighth notes is different. Those facts preclude a finding of virtual identity.

The two judges who dissented were Judges Sandra Ikuta and Carlos Bea. They thought that it was not the role of judges to evaluate musical combinations, and that the *jury* should have had the opportunity to "pass judgment on Skidmore's selection and arrangement theory." They explained:

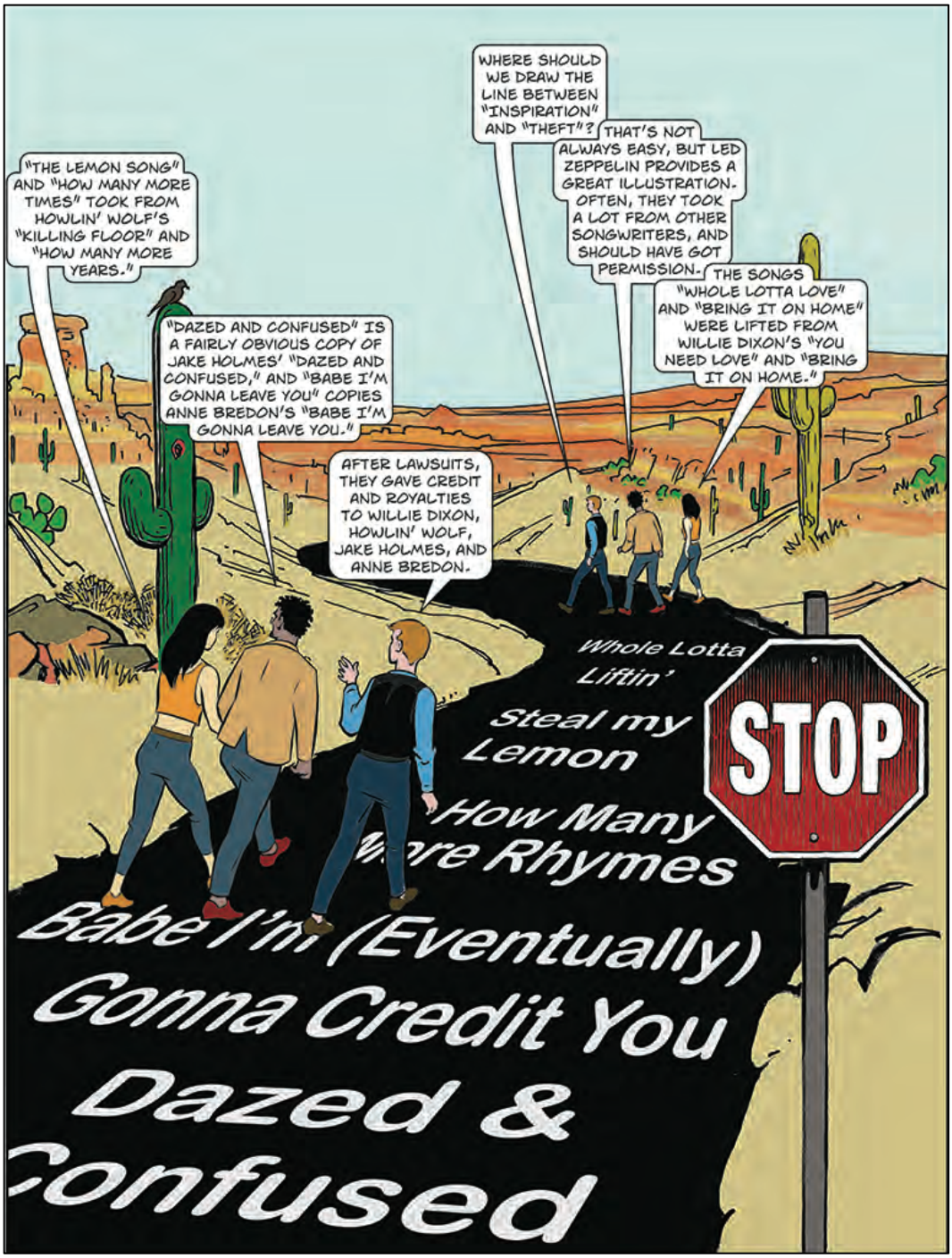
> We are not well situated to determine whether a musical passage is original; such a determination should have been left up to a properly instructed jury. Nor should we determine whether the four bars at issue meet some judicially constructed standard for "holistic musical design."

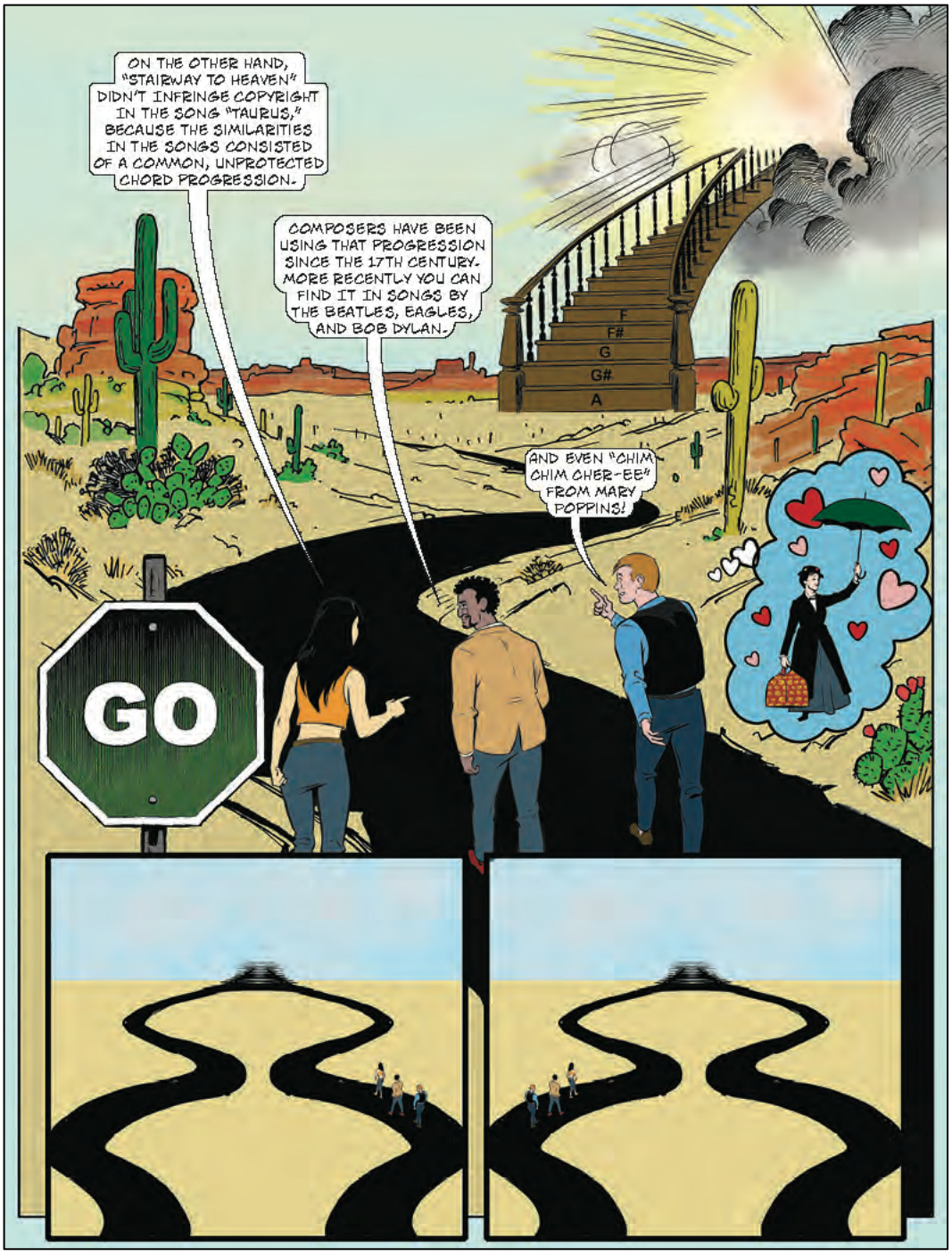
In addition to addressing originality and musical combinations, the *Zeppelin* decision **unanimously rejected the "inverse ratio" rule** once and for all. This was the rule you read about in the last chapter; as described by the Ninth Circuit, it required "a lower standard of proof of substantial similarity when a high degree of access is shown." With "Blurred Lines," because Pharrell Williams and Robin Thicke acknowledged familiarity with "Got to Give It Up," this high degree of access weighed against them when it came to substantial similarity. Most other judicial circuits had already rejected the rule, because it never made sense. As you learned in Chapter Five, access is part of showing *factual copying*; once that has been established, the amount of similarity required to prove *infringement* is a separate question. If you and your roommate both write songs with the same basic chord progression, "access" might be a slam dunk since you live together, but there is still no "substantial similarity," because your songs only share unprotected material.

Now you have read the highlights from a watershed legal decision. It moved the needle on several key issues. In order to enable creativity, the court made it more difficult to claim ownership of basic musical material, leaving building blocks and random "combinations" free for future creators. It also joined other judicial circuits in rejecting the inverse ratio rule. Copyright expert William Patry, who wrote the treatises *Patry on Copyright* and *Patry on Fair Use* and is also a lifelong musician, said of the *Zeppelin* decision: "[It] did away with some of the things that caused the 'Blurred Lines' case to go astray…I would like to think that if the 'Blurred Lines' case came after the Led Zeppelin case, it might be decided differently." The impact of the *Zeppelin* can already be seen in the Katy Perry case we are about to explore decision as well as other lower court cases. Going forward, will we see continued change in how music cases are decided? It will be fascinating to watch.

8.4 PERMISSIBLE AND IMPERMISSIBLE BORROWING

Now let's turn to Led Zeppelin, the *band*, for a moment. They prevailed in this case, but they have not always been on the right side of the law. Led Zeppelin has done a *lot* of copying, some of it *clearly* over the line. As a result, their music offers an illustration of both permissible and impermissible borrowing. Here are the comic book characters discussing what falls on either side of that divide.


"THE LEMON SONG" AND "HOW MANY MORE TIMES" TOOK FROM HOWLIN' WOLF'S "KILLING FLOOR" AND "HOW MANY MORE YEARS."
"DAZED AND CONFUSED" IS A FAIRLY OBVIOUS COPY OF JAKE HOLMES' "DAZED AND CONFUSED," AND "BABE I'M GONNA LEAVE YOU" COPIES ANNE BREDON'S "BABE I'M GONNA LEAVE YOU."
AFTER LAWSUITS, THEY GAVE CREDIT AND ROYALTIES TO WILLIE DIXON, HOWLIN' WOLF, JAKE HOLMES, AND ANNE BREDON.
WHERE SHOULD WE DRAW THE LINE BETWEEN "INSPIRATION" AND "THEFT"?
THAT'S NOT ALWAYS EASY, BUT LED ZEPPELIN PROVIDES A GREAT ILLUSTRATION. OFTEN, THEY TOOK A LOT FROM OTHER SONGWRITERS, AND SHOULD HAVE GOT PERMISSION.
THE SONGS "WHOLE LOTTA LOVE" AND "BRING IT ON HOME" WERE LIFTED FROM WILLIE DIXON'S "YOU NEED LOVE" AND "BRING IT ON HOME."
Whole Lotta Liftin'
Steal my Lemon
How Many re Rhymes
STOP
Babe I'm (Eventually) Gonna Credit You Dazed & Confused


ON THE OTHER HAND, "STAIRWAY TO HEAVEN" DIDN'T INFRINGE COPYRIGHT IN THE SONG "TAURUS," BECAUSE THE SIMILARITIES IN THE SONGS CONSISTED OF A COMMON, UNPROTECTED CHORD PROGRESSION.
COMPOSERS HAVE BEEN USING THAT PROGRESSION SINCE THE 17TH CENTURY. MORE RECENTLY YOU CAN FIND IT IN SONGS BY THE BEATLES, EAGLES, AND BOB DYLAN.
AND EVEN "CHIM CHIM CHER-EE" FROM MARY POPPINS!
F
F#
G
G#
A
GO

It is now time to turn to the final case study in our series: the one involving Katy Perry.

8.5 "JOYFUL NOISE" v. "DARK HORSE"

Katy Perry in the controversial "Dark Horse" video. Illustration by Anastasia Bodea Crisan

The third case in our deep dive is *Gray v. Hudson*. (This case was originally called *Gray v. Perry* but in the final decision the name was changed to *Gray v. Hudson* after Katy Perry's birth name, Katheryn Hudson.) In 2014, the Christian hip-hop artist Marcus Gray, professionally known as "Flame," filed a lawsuit claiming that Katy Perry's hit "Dark Horse" infringed the copyright in his song "Joyful Noise," written by Gray and his fellow plaintiffs Emanuel Lambert and Chike Ojukwu. The claim was based on a similar synthesizer part in both songs. In 2019, a jury ruled against Perry, ordering Perry and her fellow defendants—the other "Dark Horse" songwriters and related record companies—to pay $2.78 million in damages, with Perry's portion at just over $550,000.[28]

The verdict sent another series of shockwaves through the music industry, amplifying the anxiety generated by the "Blurred Lines" verdict and the earlier "Stairway to Heaven" decision. (At the time, Led Zeppelin had not yet won its appeal, so at that point all three cases had gone against the defendants.) Columnist John Gapper wrote a *Financial Times* op-ed about the Katy Perry case, voicing concerns about its threat to artistic freedom: "The musical magpie is under threat… The balance of freedom of artistic expression versus copyright protection has swung heavily to the latter." The *Rolling Stone* article you read about earlier

[28] Why the large verdict? "Dark Horse" was a hit, and the jury attributed 22.5% of net profits to the synthesizer part, even though it was a relatively minor part of the song.

described the decision as "stunning both the music business and the legal community," and sounded an alarm about "an avalanche effect of further infringement lawsuits. All of this is striking fear into professional musicians' hearts."

Musical experts weighed in as well. Fifteen musicologists submitted a brief supporting Katy Perry's appeal of the verdict. They concluded: "Given the limited number of common elements, or 'building blocks' available to songwriters, they have become anxious as to their freedom to use these, fearing unwarranted and frivolous copyright lawsuits based on their use of them… Composers must be able to freely borrow from the rich musical public domain to maintain the vibrancy and innovation that has long characterized the sphere of popular music in America."

After the initial verdict against Katy Perry, the *Zeppelin* decision came out. It was good news for Perry, who ended up winning the case. In March 2020, a week after the *Zeppelin* decision, the district court in Perry's case took the unusual step of vacating the jury verdict against her, on the grounds that there was insufficient evidence for a reasonable jury to find infringement. On appeal, the district court's opinion was upheld. Courts rarely overturn jury verdicts, but the *Zeppelin* case appears to have prompted a shift toward ensuring that "**common musical elements**" and "**basic building blocks**" remain free for all composers, lest copyright "curtail the creation of new works." (While Perry was found not liable for copyright infringement, the music video for that song was criticized for non-legal reasons: appropriating Egyptian culture in an offensive manner.)

8.6 WHAT'S IN AN OSTINATO?

Yes, we are talking about ostinatos again! You read about one in Chapter Six when we talked about the origins of the subconscious copying theory. In the Katy Perry lawsuit, the claim centered around an eight-note ostinato—a continually repeated musical phrase or rhythm—that she and her fellow songwriters were accused of copying from "Joyful Noise." Was the "Joyful Noise" ostinato copyrightable? Or was it the kind of basic or common musical material that copyright leaves free?

To hear three famous ostinatos, listen to Ravel's "Boléro" (the continuous snare drum part), Stevie Wonder's "Superstition" (the background groove), and The Verve's "Bitter Sweet Symphony" (the repeated instrumental background, which was actually the subject of a famous sampling dispute that we will cover in Chapter Nine).

Listen to the songs

As you can hear, "Joyful Noise" and "Dark Horse" are different in melody, harmony, and rhythm; not to mention lyrical content. But they share a similar background ostinato—it is the synthesizer part that plays throughout "Joyful Noise" and that occurs intermittently during the verses of "Dark Horse," starting around 00:18. "Dark Horse" also contains a second, different ostinato that begins the song and plays during the choruses.

Here is how the plaintiffs' and defendants' experts transcribed the ostinatos in question.

Dr. Todd Decker, plaintiffs' expert, provided a pared-down numerical representation emphasizing similar pitches (Figure 8.1). It shows both ostinatos repeating the third scale degree four times and the second scale degree two times, then eventually descending to the first scale degree. The carets above his numbers are there to indicate that they refer to scale degrees.

Beat	1	2	3	4	5	6	7	8
Joyful Noise	$\hat{3}$	$\hat{3}$	$\hat{3}$	$\hat{3}$	$\hat{2}$	$\hat{2}$	$\hat{2}$	$\hat{1}/\hat{6}$
Dark Horse	$\hat{3}$	$\hat{3}$	$\hat{3}$	$\hat{3}$	$\hat{2}$	$\hat{2}$	$\hat{1}$	$\hat{5}$

Figure 8.1

Dr. Lawrence Ferrara, defendants' expert (the same expert from *Zeppelin*) provided both numerical and musical transcriptions that added portamentos (slides between musical notes) that occur in "Joyful Noise" but not in "Dark Horse," and showed variations in different bars (Figures 8.2 and 8.3). On the numerical chart, "b2" denotes a "flatted" or lowered second scale degree, and the alternating numbers are bolded to facilitate reading the chart. On the musical notation, the songs are transposed to the same key for comparison.

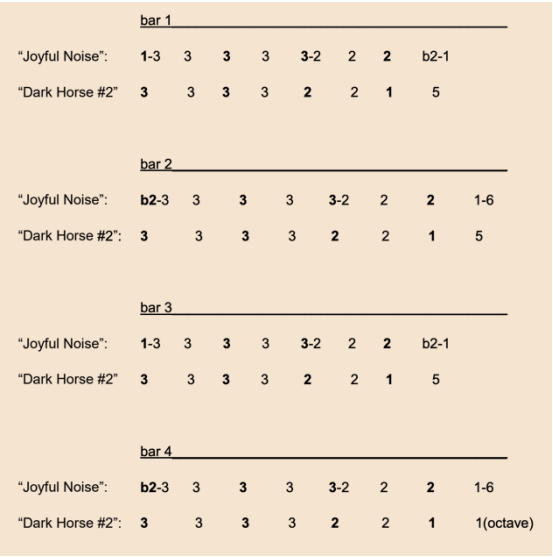

bar 1
"Joyful Noise": **1**-3 3 **3** 3 **3**-2 2 **2** b2-1
"Dark Horse #2" **3** 3 **3** 3 **2** 2 **1** 5
bar 2
"Joyful Noise": **b2**-3 3 **3** 3 **3**-2 2 **2** 1-6
"Dark Horse #2": **3** 3 **3** 3 **2** 2 **1** 5
bar 3
"Joyful Noise": **1**-3 3 **3** 3 **3**-2 2 **2** b2-1
"Dark Horse #2" **3** 3 **3** 3 **2** 2 **1** 5
bar 4
"Joyful Noise": **b2**-3 3 **3** 3 **3**-2 2 **2** 1-6
"Dark Horse #2": **3** 3 **3** 3 **2** 2 **1** 1(octave)

Figure 8.2

Figure 8.3

Notice the differences between these transcriptions. Do you find the visualizations helpful? Does one seem reductive? The other too detailed? As you will see, the court

ultimately focused on Dr. Decker's 3–3–3–3–2–2 sequence—that is, it accepted the version of the similarities provided by the plaintiffs' expert. Nevertheless, it did not find infringement, holding instead that the sequence was uncopyrightable.

8.7 THIS OSTINATO ISN'T COPYRIGHTABLE

As mentioned earlier, in March 2020, the district court vacated the jury verdict and ruled for Katy Perry and her fellow defendants. Judge Christina A. Snyder began by offering some observations that are now familiar to you. She addressed music's limited vocabulary and history of borrowing, emphasized the need to balance control and freedom, and explained why—in order to enable creativity—copyright should cover only "truly original expression." Then, canvassing previous cases, she offered examples of commonplace material that is free for all musicians to build upon.

Although there is generally a low bar for originality in copyright, given the "limited number of notes and chords available to composers," and because "common themes frequently reappear in various compositions," many if not most of the elements that appear in popular music are not individually protectable. Music, perhaps more than any other work of art, "borrows, and must necessarily borrow, and use much which was well known and used before." For this reason, courts in musical copyright cases have a significant obligation to strike a "balance between the First Amendment and the Copyright Act"–to "encourage[ ] others to build freely upon the ideas and information conveyed by a work," and at the same time motivate creative activity, by carefully limiting the scope of copyright protection to truly original expression only. Musical elements that are "common or trite"–such as the "use of a long-short-long rhythm," "chord progressions," certain "tempos," a "recurring vocal phrase," repeating "hook phrases," the alternating "emphasis of strong and weak beats," "syncopation," the use of "tritones," or the use of "basic musical devices in different manners," are, accordingly, not protectable. Nor are other elements "ubiquitous in popular music" like "rhythms," "glissando[s]," "chants," "the use of horns," or "jingling or pulsing synthesizer element[s]" entitled to protection.

Two years later, in March 2022, the Ninth Circuit Court of Appeals affirmed the district court's decision. The opinion was written by Judge Milan D. Smith, Jr., the same judge that ruled *against* defendants Pharrell Williams and Robin Thicke in the "Blurred Lines" case in 2018. In ruling for Katy Perry, Judge Smith offered a fresh take on both the role of judges and the copyrightability of commonplace musical material, referring often to guidance from the intervening *Zeppelin* decision that we have just discussed. He explained: "judges retain an important gatekeeping role in applying the law…the extrinsic test requires us as a court to ensure that whatever objective similarities the evidence establishes between two works are legally sufficient to serve as the basis of a copyright infringement claim regardless of the jury's views." Turning to the music at issue, he concluded that neither the constituent parts of the "Joyful Noise" ostinato nor the way they were combined was protectable under copyright law.

The following features of the "Joyful Noise" ostinato were held to be uncopyrightable as a straightforward matter:

- the *minor scale* was a "common musical building block[] belonging to the public"
- a *sequence of eight notes* played in an *even rhythm* was a "'trite' musical choice outside the protection of copyright law"
- the "empty" *musical texture* was "far too abstract of a similarity to be legally cognizable," akin to a musical idea
- the "pingy" synthesizer *timbre* could not be owned "any more than the sound of a trombone or a banjo"[29]

The pitch sequence in the ostinato required more discussion. Copyright cases—including the "Blurred Lines" case—often focus on similarities in pitch sequence. Here, the court made clear that not all sequences of pitches will be copyrightable. The eight-note sequence in the "Joyful Noise" ostinato fell short of qualifying for copyright protection for several reasons. It was merely an "abstract sequence of pitches" rather than and a "melody," more akin to the collection of pitches in an unprotectable chord progression. Dr. Decker's own testimony indicated that moving stepwise from the scale degrees 3 to 2 to 1 was dictated by convention and aural necessity. And the same sequence could be found in numerous other songs including "Jolly Old Saint Nicholas" and earlier songs written by the "Dark Horse" songwriters themselves. Here is the court's analysis.

That leaves us with plaintiffs' contention that the pitch sequence utilized by the Joyful Noise ostinato is copyrightable, and with Dr. Decker's related comments that the two ostinatos use similar "scale degrees" and have the same "melodic content [and] shape." At this point, it is necessary to distinguish between an abstract sequence of pitches and a melody (or, more colloquially, a tune). Though the concepts are sometimes equated, creating a melody involves more than writing down a sequence of pitches; at a minimum, that sequence must also be "rhythmically organized" so as to form an "esthetic whole." While an eight-note melody may be copyrightable, the abstract eight-note pitch sequence that is a component of the melody is not.

We note that this conclusion is consistent with the rule that "chord progressions may not be individually protected" because they are basic musical building blocks. Chords are ultimately just a combination of pitches played simultaneously, so a chord progression itself consists of multiple pitch sequences playing out at the same time. If the chord progression cannot be protected, the individual pitch sequences forming the progression cannot be either.

Turning finally to the ostinatos' "melodic shape," Dr. Decker described this as "the way the melody moves through musical space." He explained that "scale degrees have in them tendencies.... There are scale degrees that want to go somewhere ... and scale degrees that say you're home like 1." Later in his testimony, he elaborated that "3 wants to go to 2, [and] the 2 wants to go to 1 because 1 is our home note." Applying this concept to the Joyful Noise and

[29] In addition, the court pointed out that because this case only involved Gray's *composition* copyright, "the choice of a particular instrument" should not have been relevant because it was not part of the underlying composition but rather how that composition was performed, and therefore was covered by the separate sound recording right.

Dark Horse ostinatos, he testified that the repetition of scale degree 3 in both songs created "tension that wants to be released and it's released to [scale degree 2] on a particularly strong beat."

As with musical texture, it could be argued that the overall "shape" of a melody as described by Dr. Decker is nothing more than an abstraction outside the protection of copyright law. In any event, as the district court recognized, Dr. Decker's explanation that the two ostinatos moved "through musical space" in similar ways simply reflects "rules of consonance common in popular music." Just as films often rely on tropes to tell a compelling story, music uses standard tools to build and resolve dramatic tension. In this vein, courts have recognized that "while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing." This is also underscored by the fact that uncontradicted evidence at trial showed that two songs predating Joyful Noise–Merrily We Roll Along and Jolly Old Saint Nicholas–used the same pitch sequence (albeit in the "major" scale rather than the minor scale) and melodic shape.

Because the use of similar pitch sequences in the Joyful Noise and Dark Horse ostinatos results only from the use of commonplace, unoriginal musical principles, it cannot be the basis for a copyright infringement claim on its own.

While it is clear from the opinion that the individual elements comprising the "Joyful Noise" ostinato cannot be owned, it is not always clear precisely *why*. The decision cites at different points to the copyright doctrines of originality, idea/expression, and scènes à faire, and sometimes these notions appear to overlap. It also uses a variety of terms to describe unprotectable matter, referring to the material claimed by the plaintiffs variously as "unoriginal," "abstract," "common," "commonplace," "trite," "conventional," "standard," or "basic." Nonetheless, the overarching legal significance is that all of these musical building blocks are in the public domain.

What about the *combination* of these elements? As you have read, even if individual musical components are not themselves copyrightable, a particular combination might be, so long as their selection and arrangement is sufficiently original. As Michael Bolton and Pharrell Williams discovered, copying a combination of otherwise unprotectable material can be copyright infringement and result in a substantial damage award. In the Katy Perry case, however, the combination of musical features shared by the ostinatos amounted to "the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm," and this selection and arrangement did not meet even copyright's lenient originality threshold. The court analogized it to the conventional way of drawing a map or arranging names alphabetically in a phonebook and refused to allow what was tantamount to an "improper monopoly over two-note pitch sequences or even the minor scale itself." Here is its reasoning.

We begin this analysis with some guiding principles. To start, the fact that the ostinatos here are only eight notes long does not foreclose the possibility of a protected arrangement of commonplace musical elements. "Each note in a scale ... is not protectable, but a pattern of notes in a tune *may* earn copyright protection." On the other hand, despite "the famously low

bar for originality," "[t]rivial elements of compilation and arrangement... fall below the threshold of originality."

One circumstance where an arrangement of individual elements lacks enough creativity to garner copyright protection is when that arrangement is "practically inevitable" or in keeping with "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." "For example, it is well-settled that copyright of a map does not give the author an exclusive right to the coloring, symbols, and key used in delineating boundaries of and locations within the territory depicted." The same is true for an alphabetical arrangement of numbers in a phonebook. These are all utterly conventional ways of arranging information, and so they cannot be called "original" under copyright law…

Likewise, the portion of the Joyful Noise ostinato that overlaps with the Dark Horse ostinato consists of a manifestly conventional arrangement of musical building blocks. Joyful Noise and Dark Horse contain similar arrangements of basic musical features mainly in that both employ the pitch progression 3-3-3-3-2-2 played in a completely flat rhythm. This combination is unoriginal because it is really nothing more than a two-note snippet of a descending minor scale, with some notes repeated. Allowing a copyright over this material would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure.

Consequently, insofar as it combines musical building blocks in the same way that the Dark Horse ostinato does, the Joyful Noise ostinato lacks "the quantum of originality needed to merit copyright protection." If we were to hold otherwise, "it is hard to believe that any collection" of pitches arranged in a flat rhythm "could fail" to meet the originality threshold.

8.8 HAVE WE SEEN THE HIGH WATER MARK?

When the initial Katy Perry verdict came out in 2019, it became the third high-profile decision that made songwriters think twice about using musical building blocks that musicians had long depended upon. Even if they were free to use an eighth-note rhythm or descending pitch sequence in isolation, if they used the same combination of basic elements that appeared in another song—whether it was the elements that comprised a style or groove, a chromatic progression, or an ostinato—they worried that they might find themselves in court. Katy Perry's lawyer, Christine Lepera, described what was at stake in her closing arguments: **"They're trying to own basic building blocks of music, the alphabet of music that should be available to everyone."**

Then the verdict against Perry was vacated. Across the music industry, there was a collective sigh of relief. Lepera said: "The 'Blurred Lines' curse—its chilling effect—has been lifted." The *Zeppelin* and *Hudson* decisions give us a growing list of elements that cannot be owned, along with various rationales for their unprotectability—whether premised on lack of originality, the need for other musicians to use conventional and euphonious features, or larger policy considerations. These cases also provide a window into what kind of evidence is persuasive, from musicological analysis to prior art.

So, is more of the musical "alphabet" now free from copyright claims? Some cases have moved in that direction. Since Katy Perry's 2022 victory, Ed Sheeran and Dua Lipa have won cases that freed up more of music's alphabet – common chord progressions, rhythms, melodic sequences, and musical styles. Their cases also demonstrated the possibility of prevailing when there is a lack of meaningful access or independent creation.

On the other hand, lawsuits over material that "should be available to everyone" continue to make their way through the courts. As of July 2026, Miley Cyrus is in the midst of defending a lawsuit involving commonplace musical fragments and a potential question of whether lyrics in an "answer song" are fair use. In a more sprawling lawsuit, which many observers had hoped would be dismissed at an early stage, a judge has just denied summary judgment motions, meaning the case may be headed to a jury. The plaintiffs in this case claim copyright over the *dembow* rhythm foundational to reggaeton. They are suing over *160* defendants, including a who's who of reggaeton. Defendants include Bad Bunny, Karol G, Luis Fonsi, Daddy Yankee, J Balvin, Justin Bieber, Shakira, Pitbull, and most of the artists behind commercially successful reggaeton songs.

In other words, despite the confident, and in some cases accurate, claim that "the tide has turned" over attempts to own the basic elements of music, the actual story is more complex. In this section, we will review some of the most recent cases and explain their significance. What should you look for as you read?

- One thing that non-lawyers often miss is the importance of the procedural components of a decision: not just what is eventually decided, but *when* it is decided, and how much it will cost as a result. Litigating a case all the way through its preliminary stages to its ultimate disposition is very expensive. The costs here are not just the costs to the individual person being sued. They include the costs to society. Court time is a scarce social resource. If judges are spending their time dealing with frivolous litigation, and jurors, experts, and other lawyers are all being employed focusing on it, by definition those resources are not available elsewhere.
- The costs of litigation are important in other ways. If I told you that you would ultimately be vindicated at trial in a suit that should never have been brought, but that litigating the case to its conclusion will cost $2 million, you might rationally decide to settle for $1 million. Plaintiffs and their lawyers are highly aware of that fact. Thus they can be incentivized to bring meritless cases and continue the pattern. The defendant who settles her case rather than paying for expensive litigation is making a rational decision *for her*, but from the point of view of the wider society, the message being sent as a result is deeply unfortunate. This is why musical experts and academics think it is so important that judges use available procedural mechanisms to dismiss meritless cases quickly and cheaply. Look at the cases that follow to see if that happened. To be clear, as explained in Chapter Four, we want meritorious claims to be vindicated. Discarding the overreaching ones can actually free up resources for that to happen. It could also elevate the perceived legitimacy of musical infringement claims overall.

- Finally, you should be looking at the grounds of the decision; not just what was decided, but for what legal reasons. The news coverage of a case may simply report that a particular artist won or lost without getting into the *why*. The result alone tells us little. If the reason a particular case succeeds or fails is idiosyncratic and highly fact-specific, then it may have little continuing significance, while on the other hand decisions that look highly technical or procedurally complex may nevertheless have enormous impact.

Armed with that "viewer's guide," how would you assess the following cases?

8.8.1 Ed Sheeran prevails

In three separate cases, Ed Sheeran was accused of infringing on the 1973 song "Let's Get It On" with his 2014 song "Thinking Out Loud." (We'll learn why there were three different cases in a moment.) Like "Got to Give It Up," "Let's Get It On" was a number one hit by Marvin Gaye. Here it was not Gaye's heirs who sued, but the heirs of his co-author Ed Townsend. The first lawsuit was filed in 2017, in the wake of the "Blurred Lines" verdict. After a long delay, it went to court in 2023. This litigation raises issues that are now familiar to you, including independent creation and what kinds of musical combinations can be owned. It also illustrates how music copyright trials play out in court.

Listen to the songs

You may hear some similarities between the songs. The question is: Why? Is it because Sheeran copied original material from Townsend and Gaye? Or because both songs build on standard musical building blocks?

The melody and lyrics of the two songs are different. But they use a similar chord progression that is set to a syncopated rhythm. The chord progressions? "Let's Get It On" uses a I-iii-IV-V and "Thinking Out Loud" uses a I-I6-IV-V. The second chords are different—iii is a minor chord while I6 is a major chord (an inversion of the I chord). The remaining I, IV, and V chords are among the most common in popular music. What about the rhythm? The second and fourth chords in both progressions are "anticipated," meaning they come in before the down beat.

Before the trial, the judge made clear that both the I-iii-IV-V progression and syncopated rhythm, standing alone, were "common musical techniques." The I-iii-IV-V sequence was in dozens of songs predating "Let's Get It On" and is featured in introductory guides on how to play guitar and piano. In *Guitar for Advanced Beginners*, the author Dan Emery noted:

> By the way, even though "Let's Get It On" was recorded in 1973, which is AFTER dozens of other I-iii-IV-V songs were recorded, I firmly believe that Marvin Gaye did not plagiarize the song—he was simply writing a song using a common progression, just like every other professional songwriter does.

Note that Emery is saying that if someone *could* own such a chord sequence, then Gaye himself might have been in trouble!

The rhythmic pattern was also commonplace. Sheeran himself had used it in ten songs prior to "Thinking Out Loud." As with the "Blurred Lines," "Stairway to Heaven," and "Dark Horse" cases, the copyright claim here centered on the combination of otherwise unprotectable elements—a chord pattern plus a rhythm.[30]

A courtroom artist's depiction of Sheeran playing guitar on the stand (Photo 8.1)

At trial, the lawyer for the plaintiffs played a video that they called their "smoking gun." It was from a concert in Zurich where Sheeran performed a mashup of "Thinking Out Loud" and "Let's Get It On," indicating that he was aware of the songs' similarities. When questioned about the mashup, Sheeran said: "Quite frankly, if I had done what you're accusing me of doing, I would be an idiot to stand on a stage in front of twenty thousand people and show that." He explained that "most pop songs revolve around sort of three or four chords, and you can kind of play most pop songs over most pop songs." To demonstrate, he transitioned between "Thinking Out Loud" and Van Morrison's "Have I Told You Lately," Shania Twain's "You're Still the One," Bob Dylan's "Just Like a Woman," and Van Morrison's "Crazy Love," among other songs (Photo 8.1). The Zurich video was not such a smoking gun after all—rather than proving copyright infringement, it allowed Sheeran to show how pop songs are built on standard harmonies and rhythms.

Logically enough, many thought that the verdict would turn on whether these kinds of elements were protectable in the aggregate. In the end, however, the jury did not need to reach that question. The first question on the verdict form was: "Did Defendant Sheeran establish by a preponderance of the evidence that he independently created 'Thinking Out Loud' and thus did not infringe the copyright of 'Let's Get It On'"? They answered "Yes." If there was no copying, there could be no infringement. Think back to your viewer's guide. While Sheeran would be rightly delighted with the result, the jury is saying that in this case he had not copied as a matter of *fact*. Observers had hoped instead for a ruling from the judge that, as a matter of *law,* no one could own basic sequences of this kind.

You may remember the George Harrison and Michael Bolton cases from Chapter Six. They also tried to prove independent creation, but their stories were defeated by the assumption that they had subconsciously copied from the plaintiffs' songs. The Sheeran case came out differently.

How did Sheeran establish that he *independently created* "Thinking Out Loud"? He had written the song with Amy Wadge, a friend and collaborator, at his home in Suffolk, England. Wadge was not named as a defendant in the lawsuit, but she and Sheeran both presented testimony in court about how they developed the song. They had stayed up late the night before talking about their older relatives and life-long love. It was a difficult time.

[30] The plaintiff's musical expert attempted to pick out melodic similarities between the songs, but this testimony lacked musical credibility. As in some of the other cases you have read about, many aspects of the expert's testimony were questionable. At trial, he even fabricated the chord progression in the beginning of "Thinking Out Loud," arguing that it was I-iii-IV-V instead of I-I6-IV-V.

Wadge's mother-in-law was dying, Sheeran's paternal grandfather had recently died, and his maternal grandmother was in a wheelchair after cancer surgery. Their conversation inspired the song's lyrics: "When your legs don't work like they used to before / And I can't sweep you off of your feet…Darling I will be loving you 'til we're 70…"

It was Wadge who came up with the I-I6-IV-V sequence. Sheeran had gone to take a shower, and she grabbed one of his guitars – a gift from Harry Styles apparently – and started playing the progression. She had recently used the same chords and a similar rhythm in another song called "Better Than Me." Sheeran liked the way it sounded and said: "We need to do something with that." They finished the song that night. From their story, it did not appear as though "Let's Get It On" was anywhere in their minds. Wadge was just riffing on basic chords, "just like every other professional songwriter does."

Sheeran won the trial, but that was not the end of the "Thinking Out Loud" lawsuits. There was still another pending case involving the same copyright claim over the same two songs. This may seem strange to non-lawyers—it seems pretty strange to lawyers too—but it was because "Let's Get It On" has multiple owners and they brought separate cases. The plaintiffs in the first case were Townsend's direct heirs—his daughter Kathryn Griffin Townsend and the estates of his sister and former wife. It is referred to as Griffin v. Sheeran. There was a human side to the litigation—after the verdict, Griffin reportedly embraced Sheeran and said: "All I ever wanted to do was talk to you about this…I'm sorry it took all this to make that happen." Sheeran offered her tickets to his upcoming concert.

The second lawsuit was filed by a company called Structured Asset Sales ("SAS"), which had purchased the rights held by one of Townsend's sons. Twelve days after Sheeran won the first trial, the district court judge in the SAS case ruled that the chord pattern could not be owned—by anyone: "The combination of the chord progression and harmonic rhythm in "Let's Get It On" is too commonplace to merit copyright protection." In November 2024 the Second Circuit Court of Appeals affirmed the district court. It concluded: "Even when combined, the four-chord progression and syncopated harmonic rhythm at issue are too unoriginal for copyright protection." Sheeran won on summary judgment, so there was no need for a jury trial—"no reasonable jury could find that the two songs, taken as a whole, are substantially similar in light of their dissimilar melodies and lyrics." This decision is important because, as you learned in Chapter Four, appellate court decisions are binding precedent in their circuits. The Second Circuit includes courts in New York that frequently decide copyright cases. Can you see the difference in the ongoing significance of the first Sheeran case and this one? He won both, but the potential impact of the second decision on future cases is far greater.

Echoing language that you have read before, the Second Circuit decision underscored the necessity of borrowing to make music.

Important here, music "borrows, and must necessarily borrow, and use much which was well known and used before." **Affording robust copyright protection for simple combinations of common musical elements could thwart, rather than encourage, creativity.**

Copyright law accounts for both "the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music." Thus, basic musical building blocks like notes, rhythms, and chords are generally not copyrightable.

Once again, this case dealt with a combination of otherwise uncopyrightable elements—SAS claimed to own the selection and arrangement of only two things, the chord progression plus syncopated rhythm. The court rejected this theory, quoting from the Ninth Circuit's *Skidmore* decision discussed earlier in this chapter and reiterating the Constitutional purpose of copyright law, covered in Chapter Two.

SAS's selection-and-arrangement claim also fails because it risks granting a monopoly over a combination of two fundamental musical building blocks. The four-chord progression at issue–ubiquitous in pop music–even coupled with a syncopated harmonic rhythm, is too well-explored to meet the originality threshold that copyright law demands. See, e.g., *Skidmore* ("[M]any works of art can be recast as compilations of individually unprotected constituent parts … deem[ing] substantially similar two vastly dissimilar musical compositions, novels, and paintings for sharing some of the same notes, words, or colors."). **Overprotecting such basic elements would threaten to stifle creativity and undermine the purpose of copyright law**: "To promote the Progress of Science and useful Arts." U.S. CONST., art. I, § 8, cl. 8.

Believe it or not, there was also a *third* case involving the same two songs, thanks to a creative legal strategy by SAS. "Let's Get It On" was from 1973, so – as with "Got to Give It Up" – its copyright was limited to what was on the sheet music deposited with the Copyright Office. In 2020, the company got a new copyright registration for "Let's Get It On" by submitting the recording as the "deposit copy," as current copyright law allows. The material covered by the new copyright cannot overlap with what is already covered by preexisting copyrights, so the new right would encompass compositional elements fixed in the recording but excluded from the sheet music. Its legitimacy has not been fully tested in court. Nonetheless, it allowed SAS to file another lawsuit alleging that Sheeran copied features of "Let's Get It On" that were not reflected in the original deposit copy. The earlier case filed by SAS is referred to in legal documents as *SAS I*, and this newer case is referred to as *SAS II*.

This future of *SAS II* is unclear. To be sure, "Let's Get It On" includes more than what was reflected on the deposit copy, which lacks some of the bass and drum parts, among other features. Limiting "Let's Get It On" to the manuscript unduly narrowed its scope, just as limiting "Got to Give It Up" to the lead sheet unfairly circumscribed Gaye's composition.[31] But, even if SAS's new copyright is deemed valid, the similarities between "Thinking Out

[31] The jury in the first Sheeran trial did not hear the sound recording of "Let's Get It On"; only a MIDI version of what was on the deposit copy. Should *SAS II* go to trial, the jury might hear the sound recordings and detect more sonic similarities. But when comparing the songs, they would still need to exclude both the chord progression at issue in the first two cases and the performance elements that are not part of the composition copyright.

Loud" and the newly copyrighted material from "Let's Get It On" appear to involve unprotectable elements such as a common bassline, drum pattern, and tempo. Moreover, if Sheeran and Wadge wrote their song without copying from "Let's Get It On," as a jury has already determined, then the independent creation defense would apply here too.

None of this should detract from the artistry of "Let's Get It On." The Sheeran cases centered only on the unprotectable material that recurred in the two songs, not on all of the original and creative material that Townsend and Gaye added to that substrate. Ed Townsend and Marvin Gaye were brilliant songwriters. Both were African-American, and our country has a history of denying Black musicians the credit and compensation they deserved. (We will cover this in more detail in Chapter Thirteen.) We should celebrate and respect their legacy, but that legacy includes a rich tradition of relying on a musical commons on which all can draw.

Thankfully, that legacy remains intact, along with the copyright over the protectable features of "Let's Get It On." Sheeran's wins just freed up the scaffolding the song was built upon. All artists – including the next Ed Townsend and Ed Sheeran – would be harmed if something as fundamental as a syncopated I-iii-IV-V sequence could be owned. In fact, if that rule had been in place when Townsend wrote "Let's Get It On," he would have been infringing someone else's copyright! We might have missed out on one of the greatest songs of all time.

Not all cases involve the kind of musical material at issue in the "Thinking Out Loud" cases, even when it comes to Ed Sheeran. In 2017 Sheeran settled a claim that he illegally copied from a song called "Amazing" in his song "Photograph." There are significant melodic similarities—not just between disembodied notes, but in how they are used, including their metric placement and duration. He also belatedly shared royalties from "Shape of You" with the songwriters of "No Scrubs," acknowledging the similarities. Without a fuller analysis of originality, scènes à faire, and substantial similarity in these songs, we do not know whether the similarities amount to copyright infringement. But infringement is certainly plausible.

The "Thinking Out Loud" litigation is different. If copyright covers common chord structures, countless songs could be illegal. This is why other songwriters told Sheeran: "You have to win this for us." For his part, Sheeran said that if those features could be owned, he would quit music: "If that happens, I'm done. I'm stopping."

> I personally think the best feeling in the world is the euphoria around the first idea of writing a great song. That feeling has now turned into "oh wait, let's stand back for a minute." You find yourself in the moment, second-guessing yourself.
>
> –Ed Sheeran

8.8.2 Dua Lipa defends "Levitating" on both coasts

Sheeran's victories preserved independent creation and the freedom to use commonplace musical combinations. In 2023 and 2025, Dua Lipa also won two separate lawsuits against different portions of her song "Levitating"—one targeted the chorus and another the descending melodic phrase you hear at the beginning of her song. You were introduced to the first of these cases in a class exercise in Chapter Five. In both instances, there was scant evidence that Dua Lipa had access to the earlier song and the similarities consisted only of commonplace material.

Listen to the songs

The 2023 decision from a California district court focused on the question of *access*—covered at the beginning of Chapter Five—and granted Lipa's "motion to dismiss" Artikal Sound System's claim that the "Levitating" chorus copied from its song "Live Your Life." It did not reach the issue of substantial similarity because there was insufficient evidence for the court to evaluate the asserted similarities.

Dua Lipa prevailed because there was no plausible theory about how she and her fellow songwriters could have encountered the plaintiffs' relatively unknown song while writing "Levitating." The allegations that "Live Your Life" was widely disseminated were "either too generic or too insubstantial"; they included "an unspecified number of live performances," selling "several hundred" CDs featuring the song, and noting that the song was "widely available online via streaming platforms" without additional details.

The "chain of events" theory was deficient as well. The contention was that one of Lipa's fellow "Levitating" songwriters had worked with another writer named Ali Tamposi on a different song from the "Levitating" album, and Tamposi was "taught guitar" by the brother-in-law of one of the Artikal Sound System band members, with whom he was also connected on Facebook, where he could have seen the band's posts. The court explained that "these attenuated links, which bear little connection to either of the two musical compositions at issue" did not establish a reasonable likelihood of access. That seems like an understatement.

The second case was decided by a New York district court in 2025. It focused on the alleged musical *similarities* rather than access because the parties had agreed to a separate phase in the litigation dedicated to the question of whether the similarities between the songs were copyrightable. The key similarities consisted of a combination of two unprotectable elements: groupings of repeated 16th notes descending on a scale, plus one additional identical note. Could this be owned?

SAS I v. Sheeran had recently been decided by the Second Circuit, where the district court was located, so the court was able to cite to *Sheeran* in concluding that "if the only two elements at issue were the descending chord and the one additional note, Plaintiffs' claim would necessarily fail." But, at the last minute—in what the court called "a last-ditch effort to salvage their claim"—the plaintiffs claimed five additional similarities:

(i) the notes are "sung (in patter style) and as played by specific instruments"; (ii) "in a particular musical style (pop with a disco feel)"; (iii) "in [a] particular tempo";

(iv) "in the contexts of particular harmonies and particular accompaniments" and (v) "in the structural (the signature melody appears in the verse of all three songs) and functional (entertainment and dancing as opposed to, say, the study of the piano) contexts of the songs."

If you are thinking that these alleged "similarities" could be reduced to "they are both pop songs with a disco vibe," a point no one had denied, you would be right! Even considering this "newly-minted theory" for argument's sake, the court held that these elements were non-copyrightable, even in combination, citing to prior art from Mozart, Rossini, Gilbert and Sullivan, and the Bee Gees. In doing so, it stressed why no one can own a musical style:

More fundamentally, the Court finds that **a musical style, defined by Plaintiffs as "pop with a disco feel," and a musical function, defined by Plaintiffs to include "entertainment and dancing," cannot possibly be protectable** – alone or in tandem – because to hold otherwise would be to completely foreclose the further development of music in that genre or for that purpose.

Summary judgment was granted for Dua Lipa.

8.8.3 Can "Flowers" legally allude to "When I Was Your Man"?

Ed Sheeran and Dua Lipa won their cases, but new lawsuits are always being filed. As of July 2026, two of the most closely watched cases involve Miley Cyrus' 2023 hit "Flowers" and a significant portion of the reggaeton genre. We will begin with the Cyrus litigation, which involves the claim that "Flowers" infringes Bruno Mars' song "When I Was Your Man." (No, Bruno Mars is not the plaintiff suing Cyrus. As with "Let's Get It On," "When I Was Your Man" has several owners, and this lawsuit was filed by Tempo Music Investments LLC, which bought the rights owned by Mars' co-writer.)

Listen to the songs

Personally, I think the "Levitating" case was a weak one, but at least a casual listener could hear the musical similarities between the songs. Not so here. Musically, "When I Was Your Man" and "Flowers" do not sound the same. The similarities alleged by Tempo Music include short pitch sequences with different rhythms and underlying harmonies—to quote the Katy Perry decision, a noncopyrightable "abstract sequence of pitches" rather than a "melody"—and the extremely common "circle of fifths" chord progression. Individually, they constitute commonplace and unprotectable matter; collectively, they fit Skidmore's category of unoriginal "random similarities scattered throughout the works."

It is the *lyrical* similarities between the songs that have attracted notice, and prompted speculation that Cyrus is deliberately invoking "When I Was Your Man" in "Flowers." Cyrus' ex-husband Liam Hemsworth reportedly dedicated "When I Was Your Man" to her during their tumultuous relationship. "Flowers" was released after their divorce, on Hemsworth's birthday, and makes references to their time together. The lyrics of both songs

refer to buying flowers, hand holding, "hours" (to rhyme with "flowers"), and dancing—hardly unusual themes for breakup songs—but Cyrus uses those references to convey a very different message. "When I Was Your Man" regrets lost love, while "Flowers" celebrates post-breakup resilience and self-empowerment. Many commentators situate "Flowers" in the long tradition of "answer songs" in music, which necessarily allude to earlier songs in order to respond to them. Indeed, Cyrus' lawyers have argued that her song is a transformative commentary on "When I Was Your Man." The copyright analysis of the lyrics may therefore turn on whether Cyrus is making a "fair use" of an existing song, an issue discussed in Chapter Five.

8.8.4 Reggaeton on Trial

The more sweeping lawsuit is the one targeting over 160 artists for over *1,800* allegedly infringing compositions. If you include additional allegations against the *recordings* of those songs, the total expands to over 3,000 works. The only element shared by the plaintiffs' and defendants' works appears to be the basic *dembow* rhythm foundational to reggaeton. You are probably thinking "Wait, if it's in thousands of songs from a genre, isn't that textbook scènes à faire?" Yes—and Bad Bunny's lawyers made that very argument, but it has not yet been fully analyzed by the court. (Think back to your "viewer's guide." At what point in the litigation process do you think courts should make this kind of determination?)

The plaintiffs say the defendants' songs copied from the drum pattern in the 1989 instrumental track "Fish Market," by Cleveland "Clevie" Browne and the late Wycliffe "Steely" Johnson, the Jamaican duo known as Steely & Clevie.

Listen to the songs and drum pattern

The *boom…-ch–boom–chick* you hear is the dembow rhythm. "Dembow" is a colloquial term for a standard "habanera" pattern played on kick and snare drums. Photo 8.2 provides a visual diagram of it playing twice in a four-beat measure.

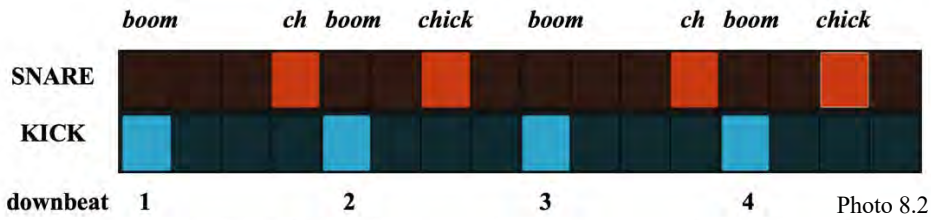


Photo 8.2

The kick drum plays on the downbeat—a straightforward time-keeping device called the "four-on-the-floor" beat—this is the "*boom.*" Then the snare plays the "…*ch*" and "*chick.*" This core rhythm is in thousands of songs after *Fish Market*, but it was also in thousands of songs *before* "Fish Market." The "habanera," which means "from Havana," dates back to Cuba in the 19th century.

The reggaeton litigation amplifies many of the themes we have covered in this book. If applying copyright's framework to melodic phrases and chord progressions was, to quote the Ninth Circuit Court of Appeals, a "somewhat unnatural task, guided by relatively little precedent," applying it to such a *rhythm* is even more so. Chapter Four explained how "with

music, not only are the boundaries of the property right unclear, but so are the boundaries of the music itself." Subsequent chapters illustrated how music—unlike books, art, or films—is not tethered to an authoritative "text." As a result, two competing musicological experts can present the same music in very different ways, some of them highly misleading.

All of this certainly holds true here. The plaintiffs present a capacious account of the rhythm over which they claim copyright. In other words, they claim to own a great deal. Their experts fuse elements from three different compositions, embellishing the basic dembow rhythm with accents such as drum rolls and what are sometimes called "ghost notes." This allows them to present a "selection and arrangement" claim over a rhythmic *combination* of otherwise unprotectable material. The defendants' experts argue that the plaintiffs are making an "attempt to claim elements that do not exist."

While many scholars of law and music had hoped that the case would be dismissed at the early "summary judgment" phase, the conflicting expert testimony successfully muddied the waters enough to prevent early dismissal. In July 2026 summary judgment was denied. As in the Dua Lipa case just discussed, the judge had attempted to streamline the proceedings by dividing the case into several distinct sections. Thus, the reggaeton case had a special phase focused only on the protectability of the rhythmic elements claimed by the plaintiffs. (If you are wondering why streamlining was desirable, imagine analyzing access and substantial similarity for 1,800 songs.) Unlike in the Dua Lipa or Sheeran cases that were dismissed, however, here the judge felt that the dueling expert testimony presented enough of a factual dispute to continue to trial.

Some scholars of law and music, including the author of this book, fear that—should the case continue to a jury trial and be wrongly decided—the result could be "Blurred Lines" on steroids. It would not merely be the assertion of copyright over basic musical building blocks, but ownership of the fundamental beat running underneath countless songs, the rhythmic backbone of an entire genre. Whatever the result, the danger is that, with experts on both sides, the inevitable disagreement between those experts means that cases will drag on, perhaps leading to unjust settlements, and even encouraging more such cases in the future.

Turning to the broader musicological implications, Berklee Professor Wayne Marshall—one of the defendants' experts and one of the nation's foremost experts on reggaeton—summed things up nicely:

> Steely & Clevie [who created the "Fish Market" track] should absolutely be recognized as influential torchbearers of Afrodiasporic and Jamaican traditions, but they became such by embracing pre-existing and long-cherished musical figures…commonplace, longstanding, and generic musical building blocks that are rightly part of a shared world musical heritage and unsurprisingly are today as popular as ever.

Returning to the theme of musical borrowing from the beginning of this book, reggaeton—like so many genres—is a remix, blending Jamaican dancehall reggae with hip-hop while rapping and singing in Spanish. Music copyright has doctrines that are intended to ensure breathing space for such genres to develop and thrive.

As Professor Marshall emphasizes, Steely & Clevie deserve credit for their musical contributions. "Fish Market" as a whole is copyrightable, but the rhythmic kernel that Bad Bunny and so many others are building upon should not be. Indeed, the claim over this rhythm is ultimately self-defeating. In the "Blurred Lines" appeal, Judge Nguyen made this observation in her dissenting opinion:

> The Gayes, no doubt, are pleased by this outcome. They shouldn't be. They own copyrights in many musical works, each of which (including "Got to Give It Up") now potentially infringes the copyright of any famous song that preceded it.

The same is true here, just as it was with the syncopated chord progression in the *Sheeran* cases. If the plaintiffs can successfully own the dembow rhythm, then someone *else* might own the bits and pieces they borrowed for "Fish Market," which would itself become illegal.

This section showed that, while the Blurred Lines decision may have marked a new high, or low, in claims over basic musical components, the story is far from over. Copyright is still hard to apply to music. Claims over combinations of commonplace material persist. The procedural complexity of some decisions may mean that, even if the correct result would *eventually* be reached, it is reached after a lengthy, and expensive, process. That tendency, in turn, may mean that the pattern will continue. We pay a price for the rules that let highly implausible cases proceed to trial, so long as an expert opinion can be conjured up on the other side. All of these outcomes matter deeply for artists and their fans. Copyright law and policy favored Sheeran and Dua Lipa. My own opinion is that it should also favor Miley Cyrus, Bad Bunny, and the other reggaeton defendants. So…is the tide turning? Have we truly seen the high water mark? *Maybe*, but it remains an open question.

8.9 WHAT ABOUT ACCESS?

Returning to the Katy Perry case—one of the important, unanswered questions in that case involved access. Access was not an issue in the Sheeran case; "Let's Get It On" was an extremely popular song and Sheeran testified that he heard it for the first time in an Austin Powers movie when he was young. By contrast, "Joyful Noise" was relatively obscure and the defendants argued that Perry and her fellow songwriters never had access to it.

The court decisions chose to focus on what musical material is and isn't covered by copyright. This made sense, as that question was front and center in many minds after *Williams* and *Zeppelin*. By concluding that the "Joyful Noise" ostinato was not copyrightable, the courts made it permissible for anyone—not just Katy Perry—to echo it, even if they did so deliberately. But they did not grapple with the equally intriguing question of whether the "Dark Horse" songwriters had any plausible "access" (discussed in Chapter Five) to "Joyful Noise" in the first place. What if they had never heard the song, and were just employing basic musical tools—a standard stepwise progression, an even rhythm? If they came up with their ostinato without hearing "Joyful Noise," and the similarities were the result of coincidence, then there would be no infringement, regardless of whether the earlier ostinato was protectable.

"Dark Horse" had six songwriters. Since all of these songwriters shared authorship, the law considered all of their possible access to the earlier song, even though the instrumental track containing the ostinato was actually created by Cirkut and Dr. Luke, over the course of a day in 2013. Katy Perry, along with Sarah Hudson and Max Martin, later added the vocal melody and lyrics, and Juicy J. wrote the rap portion. All of the songwriters submitted testimony that they had never heard "Joyful Noise" and had never heard of the artist Flame. They further testified that they wrote "Dark Horse" themselves; in copyright terms, that they "independently created" it.

There was nothing directly connecting the "Dark Horse" songwriters to "Joyful Noise," so the plaintiffs' theory of access was based on "widespread dissemination." However, there was no traditional evidence of widespread dissemination—there were no physical or digital sales of "Joyful Noise," and it was not played on the radio. But the song *was* available online, and had over **6 million** total views on YouTube and Myspace. (Six different videos of "Joyful Noise" on YouTube had accumulated 3.88 million views between 2008 and 2012—the time period between when "Joyful Noise" and "Dark Horse" were written—plus there were 2.49 million plays on the Myspace pages of Flame and another performer.)

Six million is a big number. Did this mean that the "Dark Horse" songwriters had a "reasonable opportunity" to hear "Joyful Noise"? Even though the song was "out there," what were the odds that they actually found and listened to it? The defendants argued that the song was like a "needle in a haystack" on YouTube; during the same time period, there were billions of other available videos, with 4.14 trillion total views. All six songwriters testified that they did not listen to or search for Christian hip-hop music online. And while Katy Perry, whose parents were both pastors, had released a Christian rock album when she was a teenager, she had not worked in that genre since 2002. When asked about this at trial, she explained that even back then, she was "mostly always listening to ... secular music anyway."[32]

The jury found that the available evidence—including the online views—was sufficient to establish access, and the court deferred to the jury's determination. This left a larger issue unresolved: ***What does "access" mean in the era of music streaming?***

As you read in Chapter Five, in order for there to be infringement, there must be copying, and in order for there to be copying, there must be "access." In one of the cases that was mentioned, a court concluded that songwriter Gloria Estefan did not to have access to the plaintiff's song just because she was in a room containing a DJ's collection of 15,000 records, one of which contained that song. There was no evidence that she might have actually found and listened to it. In another case, a court decided that performing a song in dorm rooms in Israel and New York would not establish access without evidence that the defendant might have been there to hear it.

Now, anyone on YouTube or TikTok has, not just 15,000, but millions of songs at their fingertips, in dorm rooms from Israel to New York. We all have *potential* "access." The

[32] There was also the fact that she did not write the ostinato; Cirkut and Dr. Luke wrote it before she laid down the lyrics.

Zeppelin case acknowledged this phenomenon, but only in passing, during its discussion of the "inverse ratio" rule.

> As a practical matter, the concept of "access" is increasingly diluted in our digitally interconnected world. Access is often proved by the wide dissemination of the copyrighted work. Given the ubiquity of ways to access media online, from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand.

If access "may" be established when a work is available on demand, "should" it? And what number of views would be sufficient on a site like YouTube, where (as of 2020) 5 *billion* videos are watched every day, and there are almost 5,000 music videos that each have over 100 million views? We know what the "floor" is—courts have confirmed that "the availability of a copyrighted work on the internet, in and of itself, is insufficient to show access through widespread dissemination." In other words, merely posting something online does not automatically mean that everyone has "access" to it. But beyond that, we do not have firm guidance; only a smattering of cases drawing conclusions based on specific factual circumstances. On one side of the line, in 2022 a district court in Minnesota said that a copyrighted design appearing for "mere seconds" in a Facebook video that received 125,000 views was insufficient. In that case the question was whether Target had access to an artist's work online before developing a clothing line, and Target had extensive evidence of independent creation. On the other side of the line, a California district court inferred access when a copyrighted work was featured in two TikTok videos that had over 4 million and 7.9 million views respectively.

The question remains: **Are view counts a meaningful way to establish access?** They do not carry the same implication as the traditional markers of "widespread dissemination," such as radio play and album sales. In the past, "access" was inferred because if a song was played repeatedly on the air, or sold a lot of copies, as a practical matter, you had a decent chance of hearing it. That was how you encountered music. "Hit" songs had broad exposure, but only a limited universe of music reached that level of success.

On-demand views and streams—whether they are on YouTube, Spotify, or another service—do not imply the same kind of exposure. **We live in an era of ubiquitous, but segmented, availability. You *could* listen to anything, but that says little about what you *actually* hear.** Maybe you are a fan of Christian hip hop and viewed the "Joyful Noise" video ten times; maybe you are on a constant diet of doom metal. If a certain number of view or stream counts—without more—indicates "widespread dissemination," then we all have "access" to a vast array of music, regardless of any likelihood that we might have heard it. As a result, the "access" requirement no longer serves its gatekeeping function, shielding songwriters who never had a realistic prospect of encountering a song. At the same time, the universe of music they are potentially liable for copying has been dramatically expanded.

Is it time to update the "access" inquiry?

What are some current songs that you think people are likely to encounter going about their day, because the songs are on regular rotation on the radio or in public places, or because *everyone* is listening to them? On streaming services, would this include the music that is constantly being plugged or recommended?

As we will discuss in Chapter Twelve, technology has changed the way we find music. Does the standard for "access" need to be updated to reflect this reality? Of course, traditional markers of access will be present in some cases—if there is a "chain of events" connecting the defendant to the plaintiff's work, or a song is still widely disseminated in a way that would reach the general public, this would still establish access. But what about music with niche popularity, or all of the other music available online?

In a prescient 2007 article called "Access Denied," Professor David Nimmer—the author of a leading treatise on copyright law—recognized that the availability of copyrighted works online "threatens upheaval to the copyright doctrine of 'access,'" and offered a range of options for recalibrating the law. He was writing before the launch of Spotify, and before we consumed most of our music through on-demand streaming. (His analysis revolved around a hypothetical site called "wycca.com," or "Win Your Copyright Case—Access!," that would post screenplays online so that everyone in Hollywood would automatically have access.) But his proposals still resonate in today's music ecosystem.

Professor Nimmer's most direct solution was to "narrow the circumstances that qualify" for access. Instead of merely a "reasonable opportunity" to encounter the copyrighted work, we could require "a reasonable likelihood," or "a reasonable opportunity combined with a minimal indication that it was actually availed." In the context of view counts, this "minimal indication" would be some kind of evidence suggesting that the video was actually viewed by the defendant. In reality, this would probably not require looking at the defendant's actual search history; that would raise privacy issues and could also be manipulated. But, in the Katy Perry case, testimony showing that Cirkut or Dr. Luke followed Christian hip hop music might be relevant.

Short of redefining access, Nimmer also suggested two other possibilities. First: "Given that access has become so much easier to prove… the requirements for proving substantial similarity between the plaintiff's and the defendant's works could be tightened up considerably." Effectively, that is what the court achieved in the Katy Perry case, by excluding the unprotectable ostinato from the similarity analysis. Notice the shift from the—now rejected—inverse ratio test, which had held that the more there was proof of access, the less similarity was needed. Nimmer is effectively arguing the opposite: since technology means that access is now ubiquitous, we should *increase* the level of similarity required. Second, Nimmer offered a related fix: "making it increasingly easy for the defendant to prove any of the pertinent copyright defenses." In the Katy Perry case, this would have given more weight to the "Dark Horse" songwriters' claim of independent creation.

As of the writing of this book, courts have not revised the "access" inquiry for the streaming era. Will they do so in the future, so that it better reflects a realistic possibility that

defendants could have heard plaintiffs' songs? We will have to wait and see, but I would hope so.

SUMMARY

This concludes our deep dive into the famous "Blurred Lines," "Stairway to Heaven," and "Dark Horse" cases and more recent litigation against Ed Sheeran, Dua Lipa, Miley Cyrus, and a sizable chunk of reggaeton. You got to see what actual expert testimony looks like. You read judicial opinions and had a glimpse into how judges and juries decide cases. And you have a sense of what is at stake for musicians and for music in these disputes. Going forward, what musical claims will fall on either side of the copyrightability line? When will similarities between protectable expression amount to copyright infringement? As lawsuits continue to be filed, courts may have the opportunity to offer additional guidance, although as mentioned before only a small portion of lawsuits results in a judicial opinion.

Chapter Nine will turn to sampling, focusing particularly on rap and hip hop, and also on remixes and mashups. Borrowing or quotation is central to many American musical forms—jazz, for example. How did the law deal with the rise of digital sampling in hip hop? Not well is the answer: some cases were extremely restrictive, telling hip hop artists that they need to get permission for sampling anything more than one note. Why was sampling treated differently from other kinds of musical borrowing? And what does this mean for sample-based music? Let's find out.

9

Sampling and Hip Hop

Inside This Chapter

9.1 THE BIRTH OF HIP HOP: A BACK-TO-SCHOOL PARTY? 224
9.2 HIP HOP'S "GOLDEN AGE" 225
9.3 PUTTING THE BRAKES ON BREAKS... 229
9.4 BEYOND THE LAW: CREATIVITY OR THEFT? 250

The next two chapters are about music sampling—incorporating parts of a pre-existing recording into a new song. Today, sampling is a routine part of your world. Many of your favorite artists may use samples. You likely have the tools to sample music yourself, on your phone or computer. For Barry, our remix artist, sampling is second nature; it is how he has always made music. However, he is unlikely to be able to release his music with a major label, or have it used in movies and on TV. In the mainstream music industry, sampling is governed by a restrictive set of practices that shape the way that sample-based music sounds, and the way the artists are compensated. By the end of these chapters, you will know why.

In Chapter Three, you read a quote from composer John Philip Sousa, who issued an ominous warning about how the new technology of the time—sound recording devices such as gramophones and player pianos—would "ruin the artistic development of music in this country." He reminisced about the time before sound recordings, when if you wanted to hear music, you had to make it—by singing it, or playing it on an instrument. He worried that with the ability to play recordings on a machine, people would no longer be active producers of music, "singing the songs of the day or old songs." They would turn into passive consumers. Creativity would atrophy: "We will not have a vocal cord left."

This chapter picks up on the story of sound recordings several decades later, with another new technology: machines that enabled the sampling and remixing of prerecorded sound. Recordings were no longer just for consumption. They became the raw materials for production, bringing us new forms of sample-based music: experimental music, electronic music, a new genre called hip hop. Creativity was not destroyed after all. Our figurative vocal cords were just making a different kind of noise.

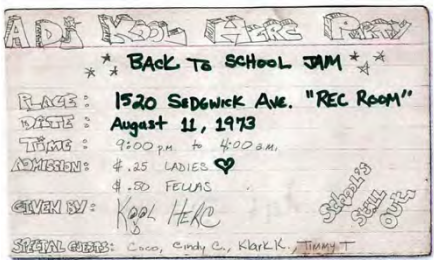
Eventually, as we have seen before in this book, the *law* got involved. In the previous chapter, we completed our deep dive into three significant cases that dealt with what aspects of musical compositions can and cannot be owned, and when a song infringes the copyright in another similar sounding song. In this chapter we will turn to copyright cases that dealt

with sampling, which implicates *both* the © composition and ℗ sound recording copyrights because sampling directly copies a snippet of recorded sound and incorporates it into a new work. This is different from the situation in the "Blurred Lines," "Stairway to Heaven," or "Dark Horse" cases, where certain features of two songs sound similar, but the defendant did not copy from a particular *recording*.

Should copyright treat sampling differently from other forms of musical borrowing? As you will read, the answer from some courts was "yes," with one decision famously concluding that sampling anything more than a single note violates copyright. On the continuum between inspiration and theft, many viewed sampling categorically as theft, both inside and outside the courtroom. This chapter will investigate why. But we will start with the music that put sampling on copyright's radar screen: hip hop.

9.1 THE BIRTH OF HIP HOP: A BACK-TO-SCHOOL PARTY?

Our story begins with a young man not so different in age from many of you. We rewind to 1973, when a new sound was born in the Bronx. Jamaican-born Clive Campbell, known as "DJ Kool Herc," who was eighteen at the time, hosted a "Back to School Jam" party. It was arranged by his younger sister Cindy, to raise money for her back-to-school clothes. One of their handwritten party invitations is shown in Photo 9.1


DJ Kool Herc Party
BACK TO SCHOOL JAM
PLACE: 1520 SEDGWICK AVE. "REC ROOM"
DATE: August 11, 1973
TIME: 9:00 p.m. to 4:00 a.m.
ADMISSION: $.25 LADIES
$.50 FELLAS
GIVEN BY: KOOL HERC
SPECIAL GUESTS: Coco, Cindy C., Klark K., Timmy T
School is Cool

The invitation for Herc's 1973 "Back to School Jam" (Photo 9.1)

"Herc" was short for "Hercules," a nickname given to Campbell for the powerful way he played basketball. Herc's dance parties became legendary. His instruments were turntables—connected to a huge, loud sound system. His source materials were funk records from artists such as James Brown, Jimmy Castor, and the Incredible Bongo Band. He noticed that dancers would go wild during the songs' "breaks"—the instrumental interludes with driving rhythms. So he used his dexterity at the turntable to isolate and extend these breaks, and to string together breaks from multiple records, using what he called a "merry-go-round" technique (Photo 9.2).

DJ Kool Herc demonstrating his Merry Go Round technique (Photo 9.2)

DJ culture was competitive, and these beats were his secret sauce—to keep other DJs from seeing what was spinning, he soaked the labels off of his records and kept them in generic sleeves. Over the music, he would encourage the dancers, using local slang: "Rock on, my mellow! This is the joint!" Herc's friend Coke La Rock served as MC, pumping up the crowd and talking over the beats, with lines such as "You rock and you don't stop!" The dancers

were called "B-boys" and "B-girls," for "break-boys" and "break-girls," and they were laying down the original moves of "breakdancing."

Herc's sound—the breakbeats, the rapping—laid the foundation for hip hop music. He inspired the genre's pioneers, including Grandmaster Flash, Afrika Bambaataa, and The Sugarhill Gang, in addition to countless others. As Herc describes it: "I set down the blueprint, and all the architects started adding on this level and that level."

In the 1980s, a technology arrived that enabled those architects to build entirely new soundscapes. With **digital samplers** (Photo 9.3), they could recreate the grooves that Herc had produced with a turntable through a different method: *sampling*. Two frequently used samplers were the Akai MPC-60 and the E-mu SP-1200. These devices allowed artists to grab and manipulate sounds from recordings, and to layer and mix them into new beats and tracks. Such samplers have remained popular. Dr. Dre, Mark Ronson, Outkast's Big Boi, and Lady Gaga all use Akai samplers.

E-mu SP-1200 sampler used by Public Enemy's producers (Photo 9.3). Source: 2xUeL/Wikimedia

This was not the first time artists had made sample-based music. From "musique concrète" compositions in the 1940s and 1950s, to the Beatles' sonic collage in Revolution #9 in the 1960s, to Stevie Wonder's use of a sampling synthesizer called the Computer Music Melodian in the 1970s, creators had already been experimenting with sampling. But early tools for sampling were expensive, and the process could be cumbersome. Digital samplers were affordable, portable, and user-friendly. Sampling had become accessible.

9. 2 HIP HOP'S "GOLDEN AGE"

This technology helped to usher in the "golden age" of hip hop. While the exact dates vary, historians place this period somewhere between the mid 1980s and early to mid 1990s. As with DJ Kool Herc, percussive breaks were popular. Two heavily sampled tracks were the drum breaks from James Brown's "Funky Drummer," played by drummer Clyde Stubblefield, and from The Winstons' "Amen, Brother," played by drummer Gregory Coleman. The latter is known as the "Amen break" (Photo 9.4). Since being used in hip hop classics such as N.W.A.'s "Straight Outta Compton" (1988), it became a fixture in genres such as "jungle" and "drum and bass" music, the names given to two British dance crazes from the 1990s.[33] That break has now been sampled across genres from pop to heavy metal to EDM. As of 2023, the

The Winstons' album with the "Amen break" (Photo 9.4)

[33] Several different MCs have been credited with originating the term "jungle music," and some have suggested that it reclaims the term from its racist history.

WhoSampled database lists "Amen, Brother" as the most sampled track in history, appearing in over 7,700 songs.

Find a Song

The best way to learn about sampling is to listen to it. Go to the WhoSampled website at www.whosampled.com. This is a crowdsourced database—with entries verified by moderators—that allows you to follow chains of sampling in music. Search for some of your favorite songs—ideally, from multiple genres. You can find out whether they contain samples, and whether they were in turn sampled by other songs, and listen to the clips. The site also shows cover versions and "replayed" samples, where instead of sampling the actual recording, the sound was recreated.

But early hip hop artists were sampling much more than funky grooves. Some of the most critically acclaimed albums of the golden age were Public Enemy's *It Takes a Nation of Millions to Hold Us Back* (1988) and *Fear of a Black Planet* (1990), De La Soul's *3 Feet High and Rising* (1989), and the Beastie Boys' *Paul's Boutique* (1989). These artists were "crate digging" through thousands of records to find kernels of sound—not just drum breaks, but horn hits, guitar licks, vocals, snippets of melody, spoken word, *noise*—and weaving them together into a dense, intricate tapestry. A single album might contain hundreds of samples.

Public Enemy

It Takes a Nation of Millions to Hold Us Back album cover (Photo 9.5)

Public Enemy blended together sampling with political commentary. On the album *It Takes a Nation of Millions* (Photo 9.5), the lyrics addressed white supremacy, Black nationalism, prison conditions, exploitation in the music industry, and even the legality of sampling. The musical bed was a sonic collage, and the combination was like nothing fans and music critics had heard before. This is how prominent music writers described it.

- Greg Tate: "a songcraft from chipped flecks of near forgotten soul gold. On *Nation* a guitar vamp from Funkadelic, a moan from Sly, a growl abducted from Bobby Byrd aren't rhythmically spliced in but melodically sequenced into colorful narratives."
- Alan Light: "[the] tracks were merciless, annoying, and sinuous, using samples not for melodic hooks or one-dimensional rhythm tracks but as constantly shifting components in an impenetrably thick, dense collage."
- Nelson George: "Pulling from the Nation of Islam's Sister Ava Muhammad, a John Coltrane solo, an Anthrax rock riff, and scores of other sound sources, *Nation* fulfilled the visionary promise of sampling as an agitprop tool."

These albums were not only critically acclaimed—they also made money. While hip hop artists were not the only ones sampling, their success made them a target for legal claims. Inevitably, lawsuits followed.

In terms of copyright law, the early days of music sampling have been called the "Wild West," with no one sure of the exact rules. Within the industry, the practice of "clearing" samples—getting licenses from the various rights holders—was developing, though not in a uniform way. Samples might be cleared if they were large or prominent, but not if they were fragmentary or altered. Recognizable samples of melodies or a chorus were more likely to be cleared than instrumental or rhythmic breaks. When uncleared samples prompted infringement claims, they were often settled out of court.

How did these sample-heavy albums above approach clearances? Public Enemy's Chuck D explained: "It wasn't necessary to clear those albums, *Fear of a Black Planet* and *It Takes a Nation*, because copyright law didn't affect us yet." The samples were not cleared on release, but the band's Hank Shocklee says that "a lot of stuff was cleared afterwards," when the legal landscape became more restrictive. Many of the samples on those groundbreaking albums were fragmentary and recontextualized and, under copyright law, could fall within the ambit of the *de minimis* or fair use exceptions. We will return to these doctrines shortly.

The Beastie Boys did license some, but not all, of the samples on *Paul's Boutique*. The band's sound engineer estimated that "they spent over $250,000 for sample clearances." They had already been sued for an unlicensed sample on their previous album *Licensed to Ill* and settled out of court. De La Soul also licensed some of the more prominent samples on *3 Feet High and Rising.* They were also sued, back in 1991, for one of the samples they did not license, an instrumental snippet from a 1960s song called "You Showed Me," recorded by The Turtles. The sample was brief and transformed, and appeared on an experimental interlude—more of a skit than a song—called "Transmitting Live from Mars." Rather than going to court, the case settled for an undisclosed sum reported to be around $1.7 million, though members of De La Soul have said the actual amount was lower than that.

The popularity of De La Soul's album and the price-tag associated with the settlement got people's attention. So did other disputes from this era. In one case, M.C. Hammer used the bassline from Rick James' "Superfreak" throughout "U Can't Touch This." Unlike the De La Soul song, "U Can't Touch This" was a hit song that made prominent and extensive uses of the sample. The sample was initially unlicensed, and an ensuing copyright claim resulted in a settlement that—appropriately—shared songwriting credit and royalties with the sampled artists. In another case, Vanilla Ice had to pay for looping the bassline from Queen and David Bowie's "Under Pressure" throughout "Ice, Ice, Baby"—this appears to have been an interpolation, playing the bassline rather than sampling it.

Listen to the difference in how De La Soul sampled and how M.C. Hammer sampled. M.C. Hammer simply took the sample and made it the background hook for his song. This is the kind of use that, under the law, should require a license. The samples on *3 Feet High and Rising* were different—fleeting and intricately layered into a new

psychedelic, playful soundscape. Some of these samples might qualify as *de minimis* or fair use, but current industry practices generally require clearing them anyway.

De La Soul

Here is how experts have described De La Soul's style:

- Jeff Chang: "They had an aesthetic of taking everything and the kitchen sink and throwing it into the blender…So, you didn't just have George Clinton, the Meters, and the usual funk stuff you would expect on a record. You'd have French language records. You'd have the Turtles. You'd have Led Zeppelin. You'd have Hall and Oates. You'd have all kinds of crazy things coming out of the mix, and it sounded the way like a lot of people heard pop culture at that moment in time."
- Nelson George, comparing De La Soul's album to Public Enemy's *It Takes a Nation of Millions to Hold Us Back*: "Equally visionary was De La Soul's whimsical debut, *3 Feet High and Rising*, a 24-track collection of raps, songs, puns, skits, and amused good feeling that was released a year after *Nation*. While P.E. [Public Enemy] looked for sounds that articulated anger and contempt, De La Soul sought bemused, off-handed noises and deceptively childlike melodies: De La Soul's "Eye Know" features Steely Dan's "Peg" rubbing up against Otis Redding's "Dock of the Bay," and on "Say No Go" Sly Stone fragments meet the Hall and Oates hook from "I Can't Go for That."

3 Feet High and Rising album cover (Photo 9.6)

The "sampledelic" music in albums such as *3 Feet High and Rising* (Photo 9.6) prompted more than praise and lawsuits. It also kept De La Soul's early music, as the New York Times described it, "trapped in digital limbo." You could buy it on vinyl records or CDs, but it was not available on Spotify or at Apple's iTunes Store (where people used to buy digital downloads of music). Why?

As mentioned above, the group actually cleared many of the samples, but the contracts detailing those clearances predated the digital marketplace, and their language did not allow for digital distribution. Renegotiating those early deals would be costly. Plus there were still uncleared samples on the albums that could lead to fresh lawsuits. The label that owned De La Soul's back catalog, did not want to tackle all of the clearances and re-clearances necessary to put the music online. A label spokesperson explained: "we don't believe it is possible to clear all of the samples for digital use." As a result, both the company and the band missed out on years of new revenue from downloads, streaming, and ringtones. Especially frustrating to De La Soul was the fact that a new generation of fans was not exposed to their music.

Sadly, in early 2023, one of De La Soul's members, David Jolicoeur – known as Trugoy the Dove – passed away. Music writer and DJ Oliver Wang wrote: "We now take for granted that our favorite artists have their catalogs readily available to us yet when in a time of grief over Trugoy's death, new and old fans were met with a deafening silence of options to revisit his musical legacy." Shortly thereafter, the group's early albums finally made it onto streaming services.

De La Soul's catalog had changed hands over the years and was purchased by the music company Reservoir Media in 2021. Reservoir gave the band ownership of its master recordings, realizing that this was the only way that the laborious clearance process would work. For a year and a half, the band members scoured old tapes to identify samples that still had to be cleared. Vincent Mason (known as Maseo) told *The New York Times*. "We fought so hard and so long for it… For [Trugoy the Dove] not to be here, it's awkward; it hurts." Sample clearance guru Deborah Mannis-Gardner was enlisted to help handle the clearances, and she told *The New York Times* how the band's ownership helped her persuade copyright holders "not to try to get blood from a stone…Everyone was just really incredible, because they want to be part of history." Even with these efforts, not all of the samples could be cleared. The band had to re-record some samples and others had to be left out.

In 2023 De La Soul's early work – albeit slightly modified – is now online. The group was also able to find a workaround to the business and creative headaches of the past for their 2016 album, *And The Anonymous Nobody*. They funded the album with a crowdsourced Kickstarter campaign that raised over $600,000, allowing them to maintain control of their music rather than giving it to a label. They then recorded more than 200 hours of music with the Rhythm Roots Allstars, a funk and soul band with whom they had toured, and sampled from that new trove of material. Creativity flourished after all, but it was different from the kind of creativity in their early albums.

9.3 PUTTING THE BRAKES ON BREAKS

Times have changed. Now, in the mainstream music industry, a simple rule applies to samples—you have to license them, even if they are fleeting or transformed. If you ask "why," you get answers such as "that's just the way the world works."[34] But that begs the question: is that the way the world *should* work—is it consistent with the law, and good for creativity? If not, *why* is it working this way?

Let's start with the first question. **How *should* copyright's rules apply to sampling?** Do these clearance practices reflect the underlying law? You have already learned enough in this book to sketch out an answer. At the outset, sampling necessarily implicates *both* the © musical composition and ℗ sound recording rights, because it uses segments of *recorded* sound. These two separate copyrights are involved, not because there are two acts of copying, but because of the *mechanism* of the borrowing, and the fact that every piece of recorded music happens to have two copyrights attached to it. As you learned in Chapter Three, this was not part of a grand design, but the product of a series of incremental developments. The upshot is that if Barry writes a song that is similar to Anita's song, she is the only one who can bring a copyright claim. But if he samples Calandra's *recording* of Anita's song, Calandra and Anita can both bring claims.

What if they do bring those claims? How would the copyright infringement analysis proceed? There are differences here too. Unlike in the Michael Bolton or Bee Gees or Katy Perry cases, here the "factual copying" inquiry is straightforward because we know there was

[34] *See* Kembrew McLeod and Peter DiCola, *Creative License*, page 94 (quoting Dean Garfield).

direct copying. We do not have to get into the "coincidence or copying?" and "did they have access?" questions from Chapter Five or the subconscious copying conundrums from Chapter Six. The analysis would move directly to the following questions: was Barry's use merely *de minimis*? If not, was there substantial similarity of copyrightable material between the two songs? If there was substantial similarity, did he make a fair use?

As you will see, when sampling cases went to court, this was not how the judges analyzed the law. There was an early case in the 1950s that was sympathetic to sampling, but the sampling was done in a satirical sketch rather than a new song. The case involved the 1956 "Flying Saucer" novelty skit by Bill Buchanan and Dickie Goodman, which featured a fake broadcast about an alien visitation interspersed with clips from popular songs that were sampled using a reel-to-reel tape recorder. The first sample provides a flavor of how the snippets are used—after the fake radio announcer said "flying saucers are real," the authors spliced in The Platters singing "too real when I feel/ what my heart can't conceal" from the song "The Great Pretender." Buchanan and Goodman were sued for copyright infringement, but a judge ruled in their favor, saying that they "artfully and cleverly have devised interesting novelty records" and concluding that a "temporary injunction ought not to issue in a case unless the offense is clear." The judge appreciated their art form; this was not the case when sampling in hip hop started to go to court.

The next comic book excerpt provides highlights from three key legal decisions about musical sampling: *Grand Upright, Bridgeport, and VMG Salsoul.* You will meet the group Public Enemy and hear from Chuck D—its lyricist and rapper, and from Hank Shocklee—a member of its Bomb Squad production team. These artists were vocal about how overbroad interpretations of copyright law changed their sound. Chuck D even wrote a protest song about it, which you should add to your (blessedly short) playlist of "famous songs about copyright law."

LET'S TALK ABOUT SAMPLING.
LOOK AT THE HISTORY OF HIP HOP...
PUBLIC ENEMY PUT HUNDREDS OF SAMPLES ON THEIR ALBUMS.
THEY TOOK EVERYTHING FROM THE BAR-KAYS TO MALCOLM X TO RUFUS THOMAS, PLAYED WITH IT, DISTORTED IT. THAT'S HOW YOU GET THAT AMAZING "WALL OF SOUND" IN '80s RAP.
PUBLIC ENEMY
SOUNDSCAPE
IT TAKES A ~~NATION~~ OF MILLIONS TO MAKE OUR SOUND
"WE WERE TAKING A HORN HIT HERE, A GUITAR RIFF THERE, WE MIGHT TAKE A LITTLE SPEECH, A KICKING SNARE FROM SOMEWHERE ELSE. IT WAS ALL BITS AND PIECES."
HANK SHOCKLEE
BITS AND PIECES STRUNG TOGETHER ON MACHINES LIKE THIS, WHICH COULD ONLY RECORD SAMPLES A FEW SECONDS LONG!
ARE YOU TELLING ME ALL OF THOSE SAMPLES WERE LICENSED?! THAT'S IMPOSSIBLE.
IT IS IMPOSSIBLE. HOW MANY BANDS SOUND LIKE THEM TODAY?

WHEN SAMPLERS STARTED TAKING FRAGMENTS OF PRIOR SONGS, THE PRACTICE WAS IN LEGAL LIMBO. THEY ONLY CLEARED RIGHTS TO REALLY LARGE SAMPLES.
"THE ONLY TIME COPYRIGHT WAS AN ISSUE WAS IF YOU ACTUALLY TOOK THE ENTIRE RHYTHM OF A SONG..."
BUT THEN HIP HOP STARTED TO GET PROFITABLE AND THE CLAIMS OF COPYRIGHT INFRINGEMENT BEGAN.
YO JIMMY!
YO LEROY
THE BEASTIE BOYS GOT SUED FOR TAKING THE PHRASE "YO LEROY" AND SOME BACKBEAT FROM A 1977 SONG BY THE JIMMY CASTOR BUNCH AND USING IT IN HOLD IT NOW, HIT IT.
WOW! HE GOT THEIR NAMES RIGHT!
BUT WE DIDN'T GET A COURT DECISION UNTIL A CASE CALLED GRAND UPRIGHT.
BIZ MARKIE HAD SAMPLED A LOT OF GILBERT O'SULLIVAN'S ALONE AGAIN (NATURALLY) – TAKING MOST OF THE PIANO INTRODUCTION. HE ALSO SANG A FRAGMENT OF THE LYRICS HIMSELF.
COOL HAT!
BIZ
HIS LAWYERS CONTACTED O'SULLIVAN'S AGENT BEFORE THE RELEASE OF THE RECORD, BUT HADN'T OBTAINED THE RIGHTS BEFORE RELEASE. O'SULLIVAN SUED, AND WON.
NOW THAT YOU'VE TAUGHT ME ALL ABOUT COPYRIGHT, THAT STRIKES ME AS AN INTERESTING CASE! WHAT DID THE JUDGE SAY ABOUT FAIR USE – THE ARGUMENT THAT SAMPLING WAS JUST LIKE JAZZ QUOTATION? OR DE MINIMIS? WERE THE BITS TAKEN JUST STANDARD – SCÈNES À FAIRE? AND HOW ABOUT...
ER...ACTUALLY, THE JUDGE'S OPINION WAS A LITTLE MORE LIMITED THAN THAT.

"'THOU SHALT NOT STEAL' HAS BEEN AN ADMONITION FOLLOWED SINCE THE DAWN OF CIVILIZATION. UNFORTUNATELY, IN THE MODERN WORLD OF BUSINESS THIS ADMONITION IS NOT ALWAYS FOLLOWED.
"INDEED, THE DEFENDANTS IN THIS ACTION FOR COPYRIGHT INFRINGEMENT WOULD HAVE THIS COURT BELIEVE THAT STEALING IS RAMPANT IN THE MUSIC BUSINESS AND, FOR THAT REASON, THEIR CONDUCT HERE SHOULD BE EXCUSED. THE CONDUCT OF THE DEFENDANTS HEREIN, HOWEVER, VIOLATES NOT ONLY THE SEVENTH COMMANDMENT, BUT ALSO THE COPYRIGHT LAWS OF THIS COUNTRY."
Judge Kevin Duffy, Grand Upright Music v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991)
WHERE'S THE LEGAL ANALYSIS?
BIZ
THERE WASN'T ANY. HE QUOTES MORE OF THE TEN COMMANDMENTS THAN OF THE COPYRIGHT ACT.
WHICH DOESN'T MEAN THE RESULT WAS THE WRONG ONE.
BIZ MARKIE HAD SAMPLED QUITE A BIT, AND HE ALSO SANG THE KEY PART OF THE MELODY, THE "GOLDEN NUGGET" AT THE HEART OF THE SONG.
"THE QUESTION, THEREFORE, IS WHETHER DEFENDANT TOOK FROM PLAINTIFF'S WORKS SO MUCH OF WHAT IS PLEASING TO THE EARS OF LAY LISTENERS... THAT DEFENDANT WRONGFULLY APPROPRIATED SOMETHING WHICH BELONGS TO THE PLAINTIFF."
Judge Jerome Frank, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)
YOU COULD CLAIM IT'S A PARODY AND THEREFORE FAIR USE AS IN THE 2 LIVE CREW CASE.
THE WORLD BIZ IS DESCRIBING IS VERY DIFFERENT FROM O'SULLIVAN'S. BUT IT IS A WEAK FAIR USE CLAIM.
THE PROBLEM WAS THE JUDGE SUGGESTING ANY SAMPLING WAS ILLEGAL. HE ISSUED AN INJUNCTION AND EVEN SUGGESTED CRIMINAL PROSECUTION!
LICEN$E EVERYTHING!
SO EVEN THOUGH THE CASE WAS AN EXTREME EXAMPLE, THE MESSAGE THE RECORD COMPANIES HEARD WAS "LICENSE EVERYTHING"!
AND THE WORLD OF HIP HOP SAMPLING CHANGED...

KEMBREW McLEOD
"THERE'S A NOTICEABLE DIFFERENCE IN PUBLIC ENEMY'S SOUND BETWEEN 1988 AND 1991...
"DID THIS HAVE TO DO WITH THE LAWSUITS AND ENFORCEMENT OF COPYRIGHT LAWS AT THE TURN OF THE DECADE?"
CHUCK D
SONIC WALL
"PUBLIC ENEMY'S MUSIC WAS AFFECTED MORE THAN ANYBODY'S BECAUSE WE WERE TAKING THOUSANDS OF SOUNDS...
LET'S TAKE IT DOWN NOW!
WHOOSH!
"IF YOU SEPARATED THE SOUNDS, THEY WOULDN'T HAVE BEEN ANYTHING – THEY WERE UNRECOGNIZABLE. THE SOUNDS WERE ALL COLLAGED TOGETHER TO MAKE A SONIC WALL."
"PUBLIC ENEMY WAS AFFECTED BECAUSE IT IS TOO EXPENSIVE TO DEFEND AGAINST A CLAIM. SO WE HAD TO CHANGE OUR WHOLE STYLE – THE STYLE OF IT TAKES A NATION AND FEAR OF A BLACK PLANET – BY 1991."

AND CHUCK D'S LYRICS SHOWED HOW HE FELT ABOUT IT.
CAUGHT, NOW IN COURT 'CAUSE I STOLE A BEAT THIS IS A SAMPLING SPORT BUT I'M GIVING IT A NEW NAME---
THEY SAY THAT WE STOLE THIS I REBEL WITH A RAISED FIST, CAN WE GET A WITNESS?*
FOUND THIS MINERAL THAT I CALL A BEAT, PAID ZERO---
AND OF COURSE "CAN I GET A WITNESS" IS THE TITLE OF A MARVIN GAYE SONG. NICE.
PEOPLE KNEW THAT THE GRAND *UPRIGHT* CASE DIDN'T REALLY SETTLE THE LEGALITIES OF SAMPLING. THEY WERE WAITING FOR THE CASE THAT WOULD FINALLY PRESENT THE ISSUES CLEANLY---
AND IN 2005, EVERYONE THOUGHT IT HAD ARRIVED.
*CAUGHT: CAN WE GET A WITNESS?, FROM "IT TAKES A NATION OF MILLIONS TO HOLD US BACK"

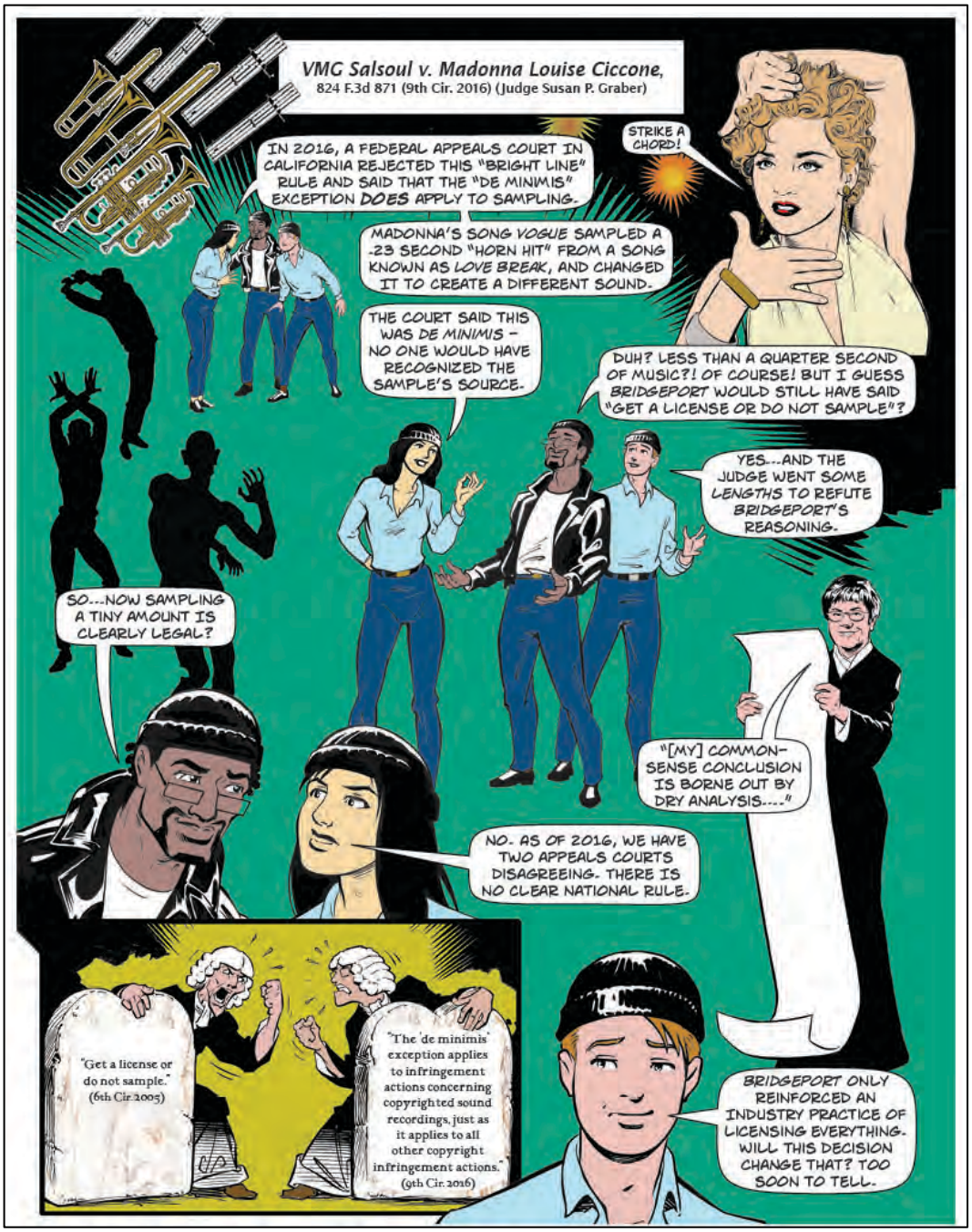
THIS IS REALLY VERY DAPPER!
N.W.A.
N.W.A HAD TAKEN TWO SECONDS OF A GUITAR SOLO FROM GEORGE CLINTON'S GET OFF YOUR ASS AND JAM. THE SAMPLE WAS OF THREE NOTES – AN ARPEGGIATED CHORD.
...OTHERWISE KNOWN AS THE DEEDLY, DEEDLY, DEEDLY OF THE FIRST GUITAR SOLO EVERY KID LEARNS TO PLAY.
※ SIGH ※
I'M SURPRISED GEORGE CLINTON OBJECTED!
OH, DIDN'T YOU KNOW HE DOESN'T OWN THE COPYRIGHTS TO HIS MUSIC!
GEORGE CLINTON
A COMPANY CALLED BRIDGEPORT MUSIC BOUGHT UP THE RIGHTS TO CLINTON'S MUSIC. THEY'RE THE ONES WHO SUED.
IS IT NORMAL FOR ARTISTS NOT TO OWN THE COPYRIGHTS IN THEIR SONGS?
YOU SOUND EXACTLY LIKE JOHN FOGERTY!
BUT I AM JOHN FOGERTY.
DEFENDANT STANDS CONVICTED OUT OF HIS OWN MOUTH!
OH YES! THAT'S WHY I JUST LOVE RECORD CONTRACTS. IN FACT IN FANTASY V. FOGERTY, JOHN FOGERTY WAS SUED FOR INFRINGING THE COPYRIGHT IN ONE OF HIS OWN SONGS.
WHEW!
DON'T WORRY. THE JURY HELD THAT IT WASN'T COPYRIGHT INFRINGEMENT.

SO N.W.A. HAD TAKEN 3 NOTES AND 2 SECONDS OF GEORGE CLINTON AND SAMPLED IT IN 100 MILES AND RUNNIN'?
THEY ACTUALLY CHANGED IT QUITE A BIT. THEY LOWERED THE PITCH AND LOOPED IT SO IT SOUNDED LIKE A POLICE SIREN IN THE BACKGROUND OF THE TRACK.
OK. I AM GOING TO SHOW OFF MY COPYRIGHT KNOWLEDGE. THE CHIEF JUSTICE OF THE SUPREME COURT SAYS JUDGES SHOULD BE LIKE UMPIRES AND JUST CALL BALLS AND STRIKES. SO, I AM GOING TO BE A COPYRIGHT UMPIRE AND CALL THIS ONE.
YOU'RE OUT!
THE ARPEGGIATED CHORD IS A STANDARD PART OF SO MANY ROCK SONGS, SO IT IS EITHER NOT ORIGINAL, OR AN UN-PROTECTABLE STOCK PHRASE. IT WOULD NOT BE COPYRIGHTABLE IN THE FIRST PLACE!
STEEE-RIKE ONE!
WHAM!
THREE NOTES IS DE MINIMIS – TOO SMALL TO COUNT AS COPYING. THIS IS JUST LIKE THE CASE OF THE BEASTIES TAKING A TINY SAMPLE OF NEWTON'S FLUTE!
STEEE-RIKE TWO!
AND FINALLY, EVEN IF THE DEEDLY, DEEDLY WERE ORIGINAL AND THREE NOTES WERE ENOUGH OF A COPY, N.W.A. TRANSFORMED IT DRAMATICALLY, SO IT WOULD PROBABLY BE FAIR USE UNDER SECTION 107!
STEEE-RIKE THREE! AND YOU ARE OUT OF HERE, BRIDGEPORT! NO COPYRIGHT INFRINGEMENT! LEGAL BORROWING!!
HOW AM I DOING?
ERRR...

WELL, YOU SHOULD BE RIGHT---
BUT THAT'S NOT QUITE HOW IT CAME OUT.
THE CASE FOCUSED ON THE DE MINIMIS CLAIM---THAT IT WAS JUST TOO LITTLE TO COUNT AS ACTIONABLE COPYING.
---BUT THERE IS ONE EXTRA THING YOU NEED TO KNOW---YOU SEE THERE ARE ACTUALLY TWO COPYRIGHTS IN ANY RECORDED MUSIC---
SOUND RECORDING COPYRIGHT
MUSIC COMPOSITION COPYRIGHT
THERE IS THE COPYRIGHT OVER THE COMPOSITION---WE ALREADY TALKED ABOUT THAT.
---BUT IN 1972 CONGRESS ADDED A COPYRIGHT OVER THE SOUND RECORDING AS WELL.
SO, IF I RECORD KNOCKIN' ON HEAVEN'S DOOR, BOB DYLAN OWNS THE COPYRIGHT OVER THE SONG. I HAVE TO PAY HIM ROYALTIES---
OK---SOUNDS PRETTY SENSIBLE. BUT HOW DOES THIS CHANGE ANYTHING? SURELY THE SAME RULES APPLY TO COPYING THE COMPOSITION AND THE SOUND RECORDING? THREE NOTES IS STILL ONLY THREE NOTES!
SO YOU WOULD THINK. BUT THE BRIDGEPORT COURT DISAGREED.
---BUT I OWN THE COPYRIGHT OVER THAT PARTICULAR RECORDING OF IT. SOMEONE WHO WANTS TO USE IT HAS TO GET PERMISSION FROM BOTH OF US.

Bridgeport Music v. Dimension Films,
410 F.3d 792 (6th Cir. 2005) (Judge Ralph B. Guy, Jr.)
"THAT LEADS US DIRECTLY TO THE ISSUE IN THIS CASE. IF YOU CANNOT PIRATE THE WHOLE SOUND RECORDING, CAN YOU 'LIFT' OR 'SAMPLE' SOMETHING LESS THAN THE WHOLE. OUR ANSWER TO THAT QUESTION IS IN THE NEGATIVE---"
"GET A LICENSE OR DO NOT SAMPLE. WE DO NOT SEE THIS AS STIFLING CREATIVITY IN ANY SIGNIFICANT WAY----"
"FOR THE SOUND RECORDING COPYRIGHT HOLDER, IT IS NOT THE 'SONG' BUT THE SOUNDS THAT ARE FIXED IN THE MEDIUM OF HIS CHOICE. WHEN THOSE SOUNDS ARE SAMPLED THEY ARE TAKEN DIRECTLY FROM THAT FIXED MEDIUM. IT IS A PHYSICAL TAKING RATHER THAN AN INTELLECTUAL ONE."
SERIES, SERIES
SERIES
NO SERIES!
PHYSICAL TAKING!!? IF YOU TAKE MY SHOES, I DON'T HAVE MY SHOES. IF YOU TAKE THE BEAT OF MY SONG, I DON'T LOSE THE SONG!!
SO TAKING ANY AMOUNT OF A SOUND RECORDING COULD BE A COPYRIGHT INFRINGEMENT?!!!
WELL, THE COURT DID SAY THAT THERE WOULD PROBABLY HAVE TO BE TWO NOTES, OTHERWISE IT WOULD NOT BE A "SERIES."
KIND OF THEM.

BUT WHY? WHY MAKE THE RULES SO DIFFERENT FOR BORROWING FROM A RECORDING AND BORROWING FROM A COMPOSITION? IF THEY SAID "GET A LICENSE OR DO NOT SOLO," EVERYONE WOULD THINK IT WAS CRAZY!!
PART OF THE REASON WAS THAT THE COURT READ THE STATUTE IN A WAY THAT NO COURT HAD EVER DONE BEFORE. BUT THE OTHER REASON WAS THAT THEY THOUGHT THIS WOULD BE A REALLY CLEAR RULE, WHAT LAWYERS CALL A BRIGHT LINE.
OKAY BUDDY, STEP OVER THAT AT YOUR OWN RISK!!
#@*!
"GET A LICENSE OR DO NOT SAMPLE!" WELL, IT IS CERTAINLY CLEAR--
--THOUGH NOT VERY BRIGHT!
NO DE MINIMIS DEFENSE NO FAIR USE
THE COURT INITIALLY SUGGESTED THERE WAS NO FAIR USE EITHER. THEN AFTER A STORM OF PROTEST, THEY ISSUED A NEW OPINION SAYING THEY TOOK NO POSITION ON FAIR USE.
BUT IF WE STILL HAVE TO JUDGE FAIR USE, THEN WHERE IS THE BRIGHT LINE?
FAIR USE? I NEVER MENTIONED FAIR USE...
NO DE MINIMIS NO FAIR USE
THAT WILL STILL HAVE TO BE DONE CASE BY CASE.
EXACTLY.


VMG Salsoul v. Madonna Louise Ciccone,
824 F.3d 871 (9th Cir. 2016) (Judge Susan P. Graber)
IN 2016, A FEDERAL APPEALS COURT IN CALIFORNIA REJECTED THIS "BRIGHT LINE" RULE AND SAID THAT THE "DE MINIMIS" EXCEPTION DOES APPLY TO SAMPLING.
STRIKE A CHORD!
MADONNA'S SONG VOGUE SAMPLED A .23 SECOND "HORN HIT" FROM A SONG KNOWN AS LOVE BREAK, AND CHANGED IT TO CREATE A DIFFERENT SOUND.
THE COURT SAID THIS WAS DE MINIMIS – NO ONE WOULD HAVE RECOGNIZED THE SAMPLE'S SOURCE.
DUH? LESS THAN A QUARTER SECOND OF MUSIC?! OF COURSE! BUT I GUESS BRIDGEPORT WOULD STILL HAVE SAID "GET A LICENSE OR DO NOT SAMPLE"?
YES...AND THE JUDGE WENT SOME LENGTHS TO REFUTE BRIDGEPORT'S REASONING.
SO...NOW SAMPLING A TINY AMOUNT IS CLEARLY LEGAL?
"[MY] COMMON-SENSE CONCLUSION IS BORNE OUT BY DRY ANALYSIS...."
NO. AS OF 2016, WE HAVE TWO APPEALS COURTS DISAGREEING. THERE IS NO CLEAR NATIONAL RULE.
"Get a license or do not sample." (6th Cir. 2005)
"The 'de minimis' exception applies to infringement actions concerning copyrighted sound recordings just as it applies to all other copyright infringement actions." (9th Cir. 2016)
BRIDGEPORT ONLY REINFORCED AN INDUSTRY PRACTICE OF LICENSING EVERYTHING. WILL THIS DECISION CHANGE THAT? TOO SOON TO TELL.

Back in Chapter Two, you were probably surprised to learn that courts have even said that hip hop artists have to get permission to sample anything more than *one note.* Now you know the source of that rule—the *Bridgeport* case—and you also know about the earlier *Grand Upright* decision that announced the more categorical notion that sampling is simply "theft." But you also know that the *Bridgeport* rule was rejected by a different judicial circuit in *Salsoul*. By departing from standard copyright analysis, *Grand Upright* and *Bridgeport* may seem anomalous, but they had an outsized impact on sampling because of the industry

customs they prompted. Returning to the questions posed before the comic excerpt: the default practice of licensing all samples is, in fact, "the way the world works now." But this is not the way the world *should* work, when these practices are out of sync with basic copyright law. This brings us to the second puzzle: *why* is it working this way?

A closer look at these cases will shed some light on the "why." The answer turns out to involve everything from "copyright trolls" to basic textual interpretation. There is also the sense that some judges had less respect for rap and hip hop music than for genres that were more familiar to them. In her article "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," Professor Olufunmilayo Arewa writes: "The discussions in *Grand Upright* and other cases reveal a disdainful, if not contemptuous, view by judges for the type of musical borrowing involved in hip hop as a genre." Commentators have pointed to an undercurrent of racism behind the harsh treatment of a genre that emerged from African American and Afro-Caribbean communities. We will cover the disparate treatment of genres associated with Black artists, and the unfair treatment of Black artists themselves, in Chapter Thirteen.

Note on terminology: As mentioned in Chapter Three, the sound recording is often called the "master" and is typically owned by a record label. The composition is sometimes called the underlying "song" and a music publisher typically owns or administers the associated "publishing" rights and royalties. Many labels and publishers fall under the umbrella of a single larger corporation, such as the "big three" major music companies—Universal Music Group, Sony Music Entertainment, and Warner Music Group. With regard to the artists, the "sampler" is the musician who uses a sample, and the "samplee" is the artist whose music was sampled.

9.3.1 *Grand Upright v. Warner* (1991): "Thou Shalt Not Steal"

The *Grand Upright* case stands out for its Biblical condemnation of sampling. The opinion opened with the Seventh Commandment—which it duly footnoted with a citation to "Exodus, Chapter 20: Verse 15"—and concluded by calling for "sterner measures," referring the case to the local District Attorney for consideration of *criminal* prosecution.[35] The implication of these bookends was simple: sampling equals theft. The message to the music industry was loud and clear: license all samples. Both the invocation of the Ten Commandments in lieu of copyright law and the call for criminal prosecution were highly unusual for a music copyright case. Happily, no one was actually charged. The judge granted a preliminary injunction, and the parties reached a settlement. Two years later, Biz Markie released a new album. Its title was "All Samples Cleared!"

[35] The music copyright cases that we cover in this book are what the law calls "civil" disputes between two parties—plaintiffs and defendants—where a plaintiff's remedies for a successful claim are monetary awards called "damages" and "injunctions" that prohibit the defendant from making and selling the infringing song. "Criminal" cases are different: they are filed by the government, and the penalties include imprisonment. While, under copyright law, there can be criminal penalties for intentional violations with a value above $1000, among other circumstances, they are not part of a civil action when one party is accusing another of copyright infringement.

Listen to the songs. As noted in the comic, the copying here is substantial. Biz Markie's lawyers could have attempted a fair use argument, but given the extent of the copying and the lack of transformation of the copied work, it probably would have failed.

Surprisingly, though there were good legal reasons to rule against Biz Markie, the *Grand Upright* decision almost completely ignored copyright law. It did not explain that the sample was a quantitatively and qualitatively substantial part of Gilbert O'Sullivan's song, or that such a use was unlikely to merit a fair use defense. Part of the blame may lie with Biz Markie's lawyers, who appeared to concede that the sample required a license, and chose instead to focus on the relatively weak arguments that the plaintiff was not the legitimate owner of the copyright, and that sampling was commonplace within the music business. But the mere failure to get a license is not proof of infringement—as mentioned earlier, licensing practices often do not track the underlying law.

While *Grand Upright* led to stricter clearance protocols, it did not offer a legal foundation for them. The copyright analysis came later in the *Bridgeport* case. Note that this is a different "Bridgeport" case than the one involving "Atomic Dog" in Chapter Four. The company Bridgeport Music bought up an arsenal of music copyrights—including those of the frequently sampled funk musician George Clinton—and fired a barrage of lawsuits against those who sampled that music, so there are many cases where the party in the title is Bridgeport.

9.3.2 From *Bridgeport v. Dimension* (2005) "Get a License or Do Not Sample" to *VMG Salsoul v. Ciccone* (2016) "We Reject That Interpretation"

Listen to the songs. You might have difficulty hearing the sample from the *Bridgeport* case, because it sounds very different from the original guitar riff. That "arpeggiated chord"—three notes from a chord that are played in quick succession—became what sounds like a police siren in the background of the N.W.A song.

"Get a license or do not sample." (6th Cir. 2005)
"The 'de minimis' exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions." (9th Cir. 2016)

From *Grand Upright* we fast forward to today, when we have the conflicting decisions between *Bridgeport v. Dimension* and *VMG Salsoul v. Ciccone.* We will refer to these cases as *Bridgeport* and *Salsoul* for short. In 2005, the *Bridgeport* case amplified *Grand Upright*'s "license everything" message, but instead of citing to the Bible, its conclusion was based on a novel interpretation of copyright's sound recording right. Eleven years later, the *Salsoul* court offered a counterpoint. When judicial circuits disagree in their interpretation of a legal rule, we call it a "circuit split." Occasionally, the Supreme Court will take a case in order to resolve the circuit split, but the Court has not yet done so here. That means that we have different approaches in the two jurisdictions in question—the Sixth and Ninth Circuits. In other parts

of the country, courts can choose the approach they think is more consistent with the law. Many lower courts have already rejected *Bridgeport*'s analysis.

The circuit split is about the *de minimis* doctrine, and whether it applies to copyright actions based on the ℗ sound recording right. You learned about this doctrine in Chapters Four and Five when you read about the *Newton v. Diamond* case. To review, in that case, the Beastie Boys sampled a small amount from James Newton's "Choir" on *Check Your Head*, the album that followed *Paul's Boutique.* They did "get a license" for the sound recording, but not for the composition. Therefore, Newton was only suing for infringement of his *composition* right. The court said that the Beastie Boys' sampling from that composition was *de minimis*, defined as a use "so meager and fragmentary that the average audience would not recognize the appropriation."

Rumor alert: You might have heard people say that sampling a certain amount—less than x seconds, or x notes, or x bars—of a song is legal. As you learned in Chapter Five, however, this is not true. There is no fixed amount that counts as *de minimis*. Instead, the definition is more flexible: a use "so meager and fragmentary that the average audience would not recognize the appropriation."

While *Newton* involved the © composition and not the ℗ sound recording copyright, the situation was reversed in *Bridgeport*—there, the composition right was licensed, but the sound recording right was not. Remember that with sampling, you have to clear both rights. Was the "meager and fragmentary" sampling of a two-second, three-note segment from a sound recording *de minimis*? The lower court in the *Bridgeport* case said "yes," because it was "small and insignificant" and "no reasonable juror, even one familiar with the works of George Clinton, would recognize the source of the sample without having been told of its source."

The appeals court reversed the lower court's decision. But its disagreement was not about whether the sample was *de minimis* under existing copyright principles—it acknowledged that "[w]ere we to follow the analysis used by the district judge, we would agree with the result he reached." Instead, the appeals court decided that the *de minimis* exception did not apply *at all* to the sound recording right. Because sampling always entails the use of a sound recording, this meant that sampling could never be *de minimis*. Hence, "get a license or do not sample." On the question of whether sampling "one note" would be OK, the court suggested that it *might* be allowed because the Copyright Act defines a "sound recording" as a "series" of sounds, and a series is more than a single note. The word "might" is emphasized above because the court stopped short of saying that sampling one note was always outside of the licensing requirement with this disclaimer: "Since that is not the fact situation in this case, we need not provide a definitive answer."

If the lesson from *Grand Upright* was "license everything," the message from *Bridgeport* was "seriously, license *everything,*" even samples that are *de minimis* or unrecognizable, like the one used by N.W.A. For the first time, the *law* was regulating music on an atomic level. Commentators and courts were taken aback by this development. *Salsoul* later restored the

de minimis analysis to sound recording actions—at least in the Ninth Circuit, where it took place. (Note that this is the same circuit that handed down the "Blurred Lines," "Stairway to Heaven," and "Dark Horse" cases.)

9.3.3 "A logical fallacy"?

The crux of the *Bridgeport* and *Salsoul* courts' disagreement came down to something that you have probably encountered in your other courses: the interpretation of texts. This is a skill that is important well beyond the scope of this course or this book. It is especially important in the law, because outcomes often turn on contested textual interpretations, especially if the text is ambiguous or unclear. The language in question might be from the US Constitution, or a statute, or a private contract. Interpreting it can be a tricky exercise. What does a *literal* reading tell you? What did the drafters *intend* for it to mean? What meaning would make *sense*, given the document's purpose and context? These questions may yield different answers. For example, the First Amendment to the US Constitution says: "Congress shall make no law abridging the freedom of speech." On its face, "no law" sounds absolute. But, of course, there are many laws that legitimately regulate speech—perjury, insider trading, child pornography, and many other forms of "speech" are illegal, and rightfully so. Taking into account the *intent* behind the First Amendment, and reading the language in a larger *context*, provides a more nuanced interpretation.

The text at issue in the *Bridgeport* and *Salsoul* cases was from the Copyright Act's provision that delineates the sound recording right. It is in § 114(b) of the statute. You already learned about its basic contours in Chapter Three. You may recall that the sound recording right is more limited than the composition right. There is no general public performance right, only the right over "digital audio transmissions." In addition, the law only covers duplication of the "actual sounds" in the recording; to "imitate" them, even perfectly, is allowed. You cannot copy and paste, but it is OK to echo. Here is the actual language describing that rule. Key language has been italicized for easier reading.

§ 114(b): The exclusive right of the owner of copyright in a sound recording… is *limited* to the right to prepare a derivative work in which the *actual sounds* fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording…*do not extend* to the making or duplication of another sound recording that *consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording*.

Read the excerpt again carefully. (Agreed, it is not exactly Shakespeare.)

Here are the courts' divergent interpretations. First, we will hear from the *Bridgeport* court, which emphasized that "[w]e have taken a 'literal reading' approach."

> This means that the world at large is free to imitate or simulate the creative work fixed in the recording so long as an actual copy of the sound recording itself is not made. That leads us directly to the issue in this case. If you cannot pirate the whole sound recording, can you "lift" or "sample" something less than the whole. Our answer to that question is in the negative….
>
> [The statute says that the sound recording rights] "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" (emphasis added). The significance of this provision is amplified by the fact that the Copyright Act of 1976 added the word "entirely" to this language. Compare Sound Recording Act of 1971 ("does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds"). In other words, a sound recording owner has the exclusive right to "sample" his own recording.

Here is the gist of the court's reasoning: if a sampler is *off the hook* for a song that consists "entirely" of other sounds, then they must be *on the hook* for anything else, even if they only use a tiny amount of the sampled song. Therefore, there is no need to engage in the *de minimis* and substantial similarity analysis that you learned about in Chapter Five; it simply does not apply to the sound recording right. For the court, this conclusion was bolstered by the fact that Congress initially did not include the word "entirely" in the 1971 version of the law, then inserted that word in 1976. From this fact, they drew the—surprising—conclusion that Congress added the word to indicate that only "entirely" nonsampled songs are outside the scope of the sound recording right. In other words, including the smallest sample would be an infringement, even if it is *de minimis.* So: "get a license or do not sample."

Now let's hear from the *Salsoul* court, which said flatly: "We reject that interpretation of § 114(b)" and provided this rebuttal.

Like all the other sentences in § 114(b), the third sentence imposes an express *limitation* on the rights of a copyright holder: "The exclusive rights of the owner of a copyright in a sound recording ... *do not extend* to the making or duplication of another sound recording [with certain qualities]." We ordinarily would hesitate to read an *implicit expansion* of rights into Congress' statement of an *express limitation* on rights. Given the considerable background of consistent application of the de minimis exception across centuries of jurisprudence, we are particularly hesitant to read the statutory text as an unstated, implicit elimination of that steadfast rule.

A straightforward reading of the third sentence in § 114(b) reveals Congress' intended limitation on the rights of a sound recording copyright holder: A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying…But the quoted passage does not speak to the question that we face: whether Congress intended to eliminate the longstanding de minimis exception for sound recordings in all circumstances even where, as here, the new sound recording as a whole sounds nothing like the original….

Close examination of *Bridgeport*'s interpretive method further exposes its illogic. In effect, *Bridgeport* inferred from the fact that "exclusive rights ... *do not extend* to the making or duplication of another sound recording that *consists* entirely of an independent fixation of other sounds," 17 U.S.C. § 114(b) (emphases added), the conclusion that exclusive rights *do extend* to the making of another sound recording that *does not consist* entirely of an independent fixation of other sounds. As pointed out by Nimmer [a leading treatise on copyright law], *Bridgeport*'s interpretive method "rests on a logical fallacy." A statement that rights do not extend to a particular circumstance does not automatically mean that the rights extend to all other circumstances. In logical terms, it is a fallacy to infer the inverse of a conditional from the conditional. *E.g.*, Joseph G. Brennan, *A Handbook of Logic*.

For example, take as a given the proposition that "if it has rained, then the grass is not dry." It does not necessarily follow that "if it has not rained, then the grass is dry." Someone may have watered the lawn, for instance. We cannot infer the second if-then statement from the first. The first if-then statement does not tell us *anything* about the condition of the grass if it has not rained. Accordingly, even though it is true that, "if the recording consists entirely of independent sounds, then the copyright does not extend to it," that statement does not necessarily mean that "if the recording does not consist entirely of independent sounds, then the copyright does extend to it."

Salsoul called this a more "natural reading," and followed it with a consideration of the Congressional intent behind the language. For guidance, it looked at what lawyers call "legislative history"—the records from the process of passing a law. Legislative history is not legally binding, but it can help to clarify the meaning of ambiguous text. Here, the legislative history to the 1976 version of § 114(b), when the word "entirely" was added, said that "infringement takes place whenever *all or any substantial portion* of the actual sounds

that go to make up a copyrighted sound recording are reproduced" (emphasis added). In other words, for there to be an infringement of the sound recording right, there needs to be substantial copying, as opposed to *de minimis* copying. Therefore, according to *Salsoul,* "Congress clearly understood that the de minimis exception applies to copyrighted sound recordings, just as it applies to all other copyrighted works. In sum, the statutory text, confirmed by the legislative history, reveals that Congress intended to maintain the de minimis exception for copyrighted sound recordings."

Notice the modes of interpretation in play as both courts try to decipher the meaning of the statutory language. First, there is the *literal reading* of the statute, informed by basic logic that suggests both that it is a stretch to read an *express limitation* as an *implicit expansion*, and a fallacy to infer the inverse of a conditional from a conditional. To put things in plainer English, saying "you *do not* infringe if your work is entirely sample-free" does not necessarily mean that "you *do* infringe if your work is *not* sample-free." How do we figure out when you *do* infringe? *Salsoul* referred to Congressional *intent*, and its report that essentially restated the substantial similarity standard. To supply an overall reading that made sense, it situated § 114(b) in the larger *context* of copyright law, where *de minimis* and substantial similarity apply to other infringement actions. By contrast, *Bridgeport* confined itself to the text, explaining that "[o]ur analysis begins and largely ends with the applicable statute"; but as you will see, there may have been other factors at play.

This may all have seemed rather nerdy, but interpreting § 114(b) was not just an academic exercise. It was consequential, not only for hip hop, but for anyone who is making sample-based music and wants access to traditional channels of distribution. If the *legal* rule for using a sound recording is "get a license or do not sample," unless you are protected by fair use, people who want to comply will have to obtain a license. Will *Salsoul* free up truly short samples, such as the .23 second horn hit? Perhaps; though as you will see later in this chapter, industry practices are already entrenched, and that makes them hard to change. You may be glad to know that a court held that Jay Z's sampling of the single word "Oh" was not copyright infringement—that case both mentioned that it was *de minimis* and said that there was no substantial similarity. A handful of other sampling cases have likewise applied substantial similarity and looked at the quantitative and qualitative significance of the sampled segment to the plaintiff's song—the more significant it is, the more likely it is to be a "substantial" taking, though sometimes the fact that the sample is by definition the "same" as the corresponding material in the original song skews the analysis toward a conclusion that there is "substantial similarity" and therefore copyright infringement.

What about fair use? As you read in the comic, initially *Bridgeport* said that neither *de minimis* nor fair use applied to sampling. But then there was a storm of protest, and the court replaced the first opinion with a new one saying it took no position either way on fair use: "we express no opinion on its applicability to these facts." It was able to skip the fair use analysis because the question never came up in the lower court—because the lower court had decided that the sample was *de minimis*, it had no need to discuss fair use. Had either court addressed fair use, there would be a strong argument in favor of it: the sample was small, and

its use was highly transformative and artistically relevant—the guitar riff was altered to sound like a police siren in the background of a song about…the police.

Bridgeport left fair use for another day, and since then, there have been few cases addressing fair use and sampling. A couple of exceptions involved the use of *lyrical* samples. You have already read about one of them: the Drake decision from Chapter Five. There, Drake altered a spoken-word sample from the jazz musician Jimmy Smith about the supremacy of jazz over other kinds of music. The court said this was fair use—Drake was clearly "transform[ing] Jimmy Smith's brazen dismissal of all non-jazz music into a statement that 'real music,' with no qualifiers, is 'the only thing that's gonna last.'" Another case also involved a much shorter sample: the phrase "party and bullshit" from the 1968 song "When the Revolution Comes," by the spoken-word group The Last Poets, where the phrase was used as a criticism of people who were going to "party and bullshit" instead of preparing for the revolution. That phrase was sampled by the Notorious B.I.G., and later on by Rita Ora, to *celebrate* the "party and bullshit" lifestyle. As with the Drake case, the transformation was clear: "party and bullshit" went from being a bad thing to a good thing, and the court held that the new songs transformed its purpose "from one of condemnation to one of glorification."[36] We still do not have a case evaluating whether a *musical* sample such as the one in *Bridgeport* is fair use. By the logic of the *Bridgeport* decision, ironically, it should not matter whether the sample consists of music or spoken words: a sample is a sample for the purposes of legal analysis.

Why the lack of cases? Technically, *Bridgeport* left the door open for fair use defenses in future sampling disputes, but it did so begrudgingly and through a negative: "express[ing] no opinion" on it. The default rule, or baseline, that it established was "get a license or do not sample." After the decision, some defendants' lawyers refrained from making fair use arguments, even when it might help them win. Why? One theory is that the industry wanted to keep fair use off of the table because music companies represented both samplers, who might be today's defendants, and artists who were sampled *from*, who might be tomorrow's plaintiffs. A successful fair use defense in one case could mean losing the next case when the shoe is on the other foot. Another reason for the paucity of cases could be the industry practice of clearing all samples, including those that might be fair uses—if samples are cleared, then no one is going to court and claiming fair use. And when there *is* a lawsuit for uncleared samples—by underground or up-and-coming artists, for example—many of those cases settle. Finally, sometimes there is never a lawsuit, either because the sample goes undetected, or because the sampling is tolerated or even celebrated. It is the "live and let live" approach mentioned in Chapter Five.

In the end, *Bridgeport*'s statutory interpretation appears to be at odds with both a logical reading and with Congressional intent, and has been rejected not only by *Salsoul* but by lower courts in other jurisdictions, and by copyright experts. To be fair to the *Bridgeport* court, however, its conclusion may have been motivated by other considerations. It was seeking

[36] The court could also have said that "party and bullshit" was not copyrightable in the first place, or that there was no substantial similarity, but it decided to focus on fair use instead.

what lawyers call a **"bright-line" rule**—a clear rule that is easy to apply—because it seems to have believed that this would more efficiently resolve the mountain of sampling claims it had to deal with. Bridgeport Music had amassed the rights to frequently-sampled music and brought *500* counts against approximately *800* defendants "relating to the use of samples without permission in new rap recordings," targeting a who's who of rappers—Public Enemy, The Notorious B.I.G., Salt-N-Pepa, Dr. Dre, Jay-Z.

Companies like Bridgeport Music are sometimes referred to as "copyright trolls," because they are not in the business of making music and protecting their rights. Rather, their business model is to get the rights to other peoples' music, itself perfectly legitimate, and then to extract money from copyright claims that stretch the boundaries of existing law. Under these circumstances, you can see how a clear rule—such as "license everything"—would help to avoid what the court called the "mental, musicological, and technological gymnastics" that the full legal analysis would entail. When the *Bridgeport* court initially said that neither substantial similarity nor fair use applied to sampling, it did in fact provide a bright-line rule, even if the legal basis for it was shaky. However, when it later reinstated fair use as a defense, this undermined the prospect of a clear rule, since determining fair use case-by-case could require just the kind of "gymnastics" the court was trying to sidestep. The court dealt with this manifest contradiction in the logic of its own opinion by...ignoring it.

9.4 BEYOND THE LAW: CREATIVITY OR THEFT?

So far, we have been talking about the law, and the more restrictive treatment of sampling in court opinions and in industry practice. In this section, we will cover both criticisms and defenses of sampling from a moral and creative perspective.[37] Many have characterized sampling as *aesthetically* and *ethically* different from other forms of musical borrowing; something that animated both the legal framework discussed earlier, and more general disagreements within the artistic community.

In the popular debate over sampling, the two sides have viewed things very differently. Critics often echoed *Grand Upright*'s position that sampling was equivalent to theft. Particularly during the golden age of hip hop, they routinely referred to it as "stealing," or used more colorful descriptions such as "groove robbing." Mark Volman, one of the members of The Turtles who sued De La Soul, said: "Sampling is just a longer term for theft. Anybody who can honestly say sampling is some sort of creativity has never done anything creative." Chuck D responded to such portrayals in "Can We Get A Witness?": "They say that I *stole* this / I rebel with a raised fist / Can I get a witness?"

Putting aside the copyright technicalities, why did sampling—to some—seem more akin to "theft" than, say, quoting the same riff on a saxophone, or laying down a similar beat with

[37] Note that in this section, we are focusing on the ethics and aesthetics of sampling—whether it is simply "theft," or creatively inferior to other ways of making music. These questions are distinct from the legal and economic questions discussed elsewhere about whether it is necessary to get permission and how the sampled artist should get paid. Regardless of its aesthetic merit, sampling may still require a license. In Chapter Five, we also talked about the line between "inspiration" and "theft," but there it was through a different lens: namely, the legal question of when there is substantial similarity and unlawful appropriation.

a drum set? One factor may be the nature of the "thing" copied. We have talked in this book about the difficulty of pinpointing what music *is*—vibrations in the air, dots on a page? A disembodied riff has that abstract quality. A *recording* of that music seems more like a concrete *thing*. So, while it might be intuitive to think of the notes or rhythms in a riff or beat as raw materials for creativity, a recording of them might feel more like a final product than a building block—more like a chunk of property susceptible to being "stolen."

This conception may help to explain the comparisons of sampling to a *physical taking*. You encountered two of these in the comic excerpts. James Brown offered this analogy: "Can I take a button off your shirt and put it on mine? Can I take a toenail off your foot—is that all right with you?" The *Bridgeport* case used a similar line of thinking, even if less poetically: "It is a physical taking rather than an intellectual one," as though N.W.A had grabbed tangible bits of sound and absconded with them. However, as you learned earlier in this book, there is a difference between *tangible* and *intangible* property. If someone takes James Brown's button, his shirt no longer has that button on it, because a button is a physical thing. But we can all sample from "Funky Drummer" without depriving him of possession of the *recording*.

Fortunately, sampling the musical equivalent of a toenail leaves the original intact. As with other *intellectual* property, the uses are "nonrival." Under the law, the question instead is whether this use has to be paid for. Some of these uses are infringing; others are not. Taking a *sound*—like echoing a motif, ostinato, or descending chromatic bassline—is not universally "theft." Outside of the legal questions, however, this does not detract from the sentiment embodied in Brown's quote. For many artists, when their music is sampled without permission, it feels like something deeply personal has been stolen. Recall Anita's thoughts about "moral rights" in Chapter Two—she would certainly resonate with this point of view.

On the other hand, not all artists have experienced sampling as theft. Some also benefited from the renewed attention to their songs. When this happened, sampling did not merely take something away; it also gave something back, by turning on new audiences to earlier music. The hip hop group Stetsasonic rapped about the value of this kind of rediscovery in the 1988 song *Talkin' All That Jazz*. Responding to naysayers who were "Talkin' 'bout rap/ Sayin' all that crap about how we sample," they said:

> Tell the truth, James Brown was old
> 'Til Eric and Rakim came out with "I Got Soul"
> Rap brings back old R&B
> And if we would not,
> People could've forgot.

Stetsasonic is referring to Eric B. and Rakim's 1987 song "I Know You Got Soul," which sampled from the 1971 song "I Know You Got Soul," recorded by Bobby Byrd and co-written by Byrd with James Brown and Charles Bobbitt. In 1989, fresh from his third tour of England since 1987, Byrd credited samplers with helping to revive his career: "I want to be the first to stand and say that if it hadn't been for the rappers, these things would not have happened to the singers of the '50s, '60s, and '70s. This has revitalized and re-energized a

lot of us." George Clinton expressed a similar sentiment: "Funk is the DNA of hip hop. It really helped us a lot because people heard it and got to know it and wanted to hear the whole version."

Alongside the debate about whether sampling equaled theft was disagreement about whether sampling was *creative*—perhaps because it did not fit into traditional models of creativity. At the time, playing something on an instrument was a familiar way of making music; sampling was not. Ken Anderson, a lawyer who defended both De La Soul and the Beastie Boys, suggested that "sampling gets a knee-jerk reaction because of the way it's done," because people assume that "there's something that smacks of thievery in pushing a button rather than moving your fingers on an instrument. I think that's simply culture shock." To some, making music without putting in the time to learn an instrument, and lifting sounds from those who had, seemed like cheating. To others, however, the ability to sample was democratizing, opening the door for young creators who may not have had the time or opportunity to obtain formal musical training.

Linked to the idea that sampling was uncreative was the notion that samplers were "lazy," because of the perceived disparity between the amount of labor that went into creating a sampled sound, and the relative ease of pushing a button to sample it.[38] Opinions often split along generational lines. As Rapper Shock G observed: "As far as sampling is concerned, a lot of musicians and artists from the past generation thought that our generation wasn't doing enough work." Consider this exchange from a 1989 panel discussion about sampling, as reported in SPIN magazine:

> An "old school" African-American musician from the audience says to Hank Shocklee: "You spend 12 seconds sampling a record that a guy spent 15 years breaking his neck to get that sound. That's not creativity. If you want to be creative, hire the musicians and let them do the session."
>
> Shocklee responds: "There is a creative aspect in sampling. There is a difference between sampling and plagiarism. We're talking 1990s here. Why should I spend eight days to get a snare drum sound like Phil Collins? He's done it for me. I can sample that in two seconds and get onto more important things."

Those "more important things" could include "crate digging" for promising bits of sound—a time-consuming process of audio archeology, of unearthing pieces of sonic history. Shocklee recalls: "We had to comb through thousands of records to come up with maybe five good pieces." Once the sounds were found, the process of layering and syncing them could be laborious too, particularly on early technology. Mike Simpson, one of the producers on *Paul's Boutique,* remembers: "It took *so* long. And there was so much trial and error."

One recurrent theme has been that samplers could just recreate the sound in the studio. So why do they need to sample? Wouldn't it be even *more* creative to replay the sound yourself? This was the argument from the *Bridgeport* court when it said: "Get a license or do

[38] Remember that under the law, as you learned in Chapter Four, labor or "sweat of the brow" is irrelevant to copyright eligibility, which turns on "originality." It is also irrelevant to infringement—whether you violated copyright does not depend on the amount of effort you put into the challenged work.

not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a 'riff' from another work in his or her recording, he is free to duplicate the sound of that 'riff' in the studio."

How did samplers respond to this? In addition to the claim that sampling was an **efficient** way to use the technology of the time to unleash creativity, sampling artists made two other key arguments, which we will call **authenticity** and **reproducibility**.

The first argument claims that it is only the original recording that carries musical *authenticity*—the cultural connotations, and the connections to the time and place it was produced. To reproduce the sound in the studio, they argue, would be effectively a forgery—no more authentic than a facsimile of a famous painting or sculpture, or an imitation of a collectors' item. The act of sampling tries to capture the historical or aesthetic significance of a fragment of recorded sound. By using it in a new song, the sampler evokes that meaning in order to engage with it, to recontextualize it. The message can be verbal, as when Drake sampled Jimmy Smith to disagree with him, or when Public Enemy sampled "too black, too strong" from a speech by Malcolm X. It can also be sonic, as when the Public Enemy song "Fight the Power" layers together sounds that convey, as Chuck D described, "a great deal of black music history from a twenty-five-year period." Samplers summon musical memories, both their own and those of the listener. De La Soul reflected: "For someone like George Clinton's Parliament-Funkadelic, you're growing up to their music, and by using this music you make something out of a shared past." Music writer Nate Patrin describes the effect for the listener:

> Hip-hop had created a way of recognizing, acknowledging, renewing, and transforming a collective language of musical history that massively expanded the way music itself is listened to: as a mutable object, the calling up of fragmented memories that get the hook or the beat of a song stuck in your head and then make a new world out of that memory.

The *reproducibility* argument claims that some sounds cannot be reproduced precisely and thus, aurally, samples and "replays" are not fungible. With a guitar sound, for example, Shocklee explains: "The guitar that's sampled off a record is going to have all the compression that they put on the recording, the equalization. It's going to hit the tape harder. It's going to slap at you." By contrast, the replay "is almost going to have a powder effect. It hits more like a pillow than a piece of wood."

These responses do not convince all critics, however. Dean Garfield, formerly with the Recording Industry Association of America, the recording industry's trade organization, suggested an alternative to sampling: "be creative. There's nothing that compels you to sample someone's work. You can just listen to it and vibe off it and create something new." In the De La Soul story featured above, they *did* find another way to sample—they recorded new music with a band, and sampled from that. The result was great, and well received. But the creativity was of a different kind than that in *3 Feet High and Rising*, which allowed people to delight in the whimsical juxtaposition of Steely Dan and Otis Redding, or of Sly

Stone and Hall and Oates. Both albums are creative. But should licensing hurdles make them choose one mode over another?

In explaining their artistry, samplers shifted the focus from the *form* of the copying—taking bits of recorded sound—to its *function*, which was to make music. For Public Enemy's Hank Shocklee, samples—like notes, or words, or colors—were just another kind of raw material for creativity: "We use samples like an artist would use paint." Shocklee elaborated: "We believed that music is nothing but organized noise. You can take anything—street sounds, us talking, whatever you want—and make it music by organizing it. That's still our philosophy, to show people that this thing you call music is a lot broader than you think it is." As with other kinds of music, some artists were considered more innovative than others. As the electronic musician DJ Vadim put it: "One guy takes a photocopy of the Mona Lisa—that's P. Diddy, who just samples the choruses of songs. The other guy takes the same painting, chops it up and it doesn't even look like the Mona Lisa anymore. He's made it into a cow, or a spaceship."

Looked at this way, sampling was continuing the long tradition of musical borrowing, covered in Chapter Two, that ran through classical, jazz, blues, and rock and roll music. That the borrowing was achieved through new means did not make it inherently less creative. Those who denounced sampling had borrowed too—James Brown, for example, had built upon gospel and rhythm and blues to create his signature style. It can be human nature to view your own practices as natural and benign, but to see those of the next generation as disruptive and suspect. And this process can repeat itself from generation to generation. George Clinton recalled his mother's reaction to the funk music he was making: "My mother called us lazy too…We just got on the groove and we just held it—held a groove for twenty minutes…Kids love it when [parents] hate it."

In the end, how do artists feel about the ethics and aesthetics of sampling? It is fair to say that there is a range of opinions, sometimes diverging along generational lines. Let's hear from our comic book character as he works through his conflicting feelings.

I'D BE HONORED IF ANYONE SAMPLED MY MUSIC!
I'D BE AMAZED IF ANYONE WANTED TO SAMPLE YOUR MUSIC.
WELL, I DON'T KNOW. WHY CAN'T THESE HIPPITY HOP CHAPS JUST MAKE THEIR OWN MUSIC.
I LIKE BIG CARROTS AND I CANNOT LIE, YOU OTHER BUNNIES CAN'T DENY.
HIPPITY HOP!
WOULD YOU SAY THAT ABOUT JAZZ?
WHAT DO YOU MEAN?
DON'T JAZZ MUSICIANS TAKE FROM OTHER PEOPLE?
HOW?
THAT'S TOTALLY DIFFERENT...
WELL, IT'S A GREAT AMERICAN TRADITION...
WHICH STOPS WITH JAZZ, APPARENTLY?
NO – JAZZ MUSICIANS ARE TRANSFORMING THE TUNES, AND PLAYING THE MUSIC THEMSELVES...IT'S IMPROV...
BUT THEY ARE COPYING IT RIGHT? SOUNDS "LAZY" TO ME...
I THINK HE HAS A POINT. SAMPLING IS LAZY. IF THIS IS THE FUTURE OF MUSIC, WE ARE ALL IN TROUBLE. THERE'S NO REAL CREATIVITY HERE.
WHAT A BUNCH OF BALONEY. HIP HOP IS *REALLY* CREATIVE...THE BORROWING IS JUST LIKE JAZZ. YOU BORROW TO SHOW YOU KNOW YOUR ROOTS, BUT ALSO TO SHOW YOUR VIRTUOSITY IN THE WAY YOU USE THE SAMPLE.

THAT'S JUST NONSENSE. HAVE YOU LISTENED TO THIS STUFF? AUTOTUNED SINGING BY PEOPLE WHO CAN'T SING, ON TOP OF TUNES THEY DIDN'T WRITE, ALL OVER A BEAT STOLEN FROM SOME GREAT BLACK ARTIST FROM THE PAST WHO DIDN'T GET PAID.
"STOLEN?" THEN WHY ISN'T JAZZ STEALING? YOU'RE ONE OF THOSE PEOPLE WHO NEVER LOVES AN ART FORM UNTIL IT'S DEAD.
YOU WANT TO CALL THIS MUSIC? IN YOUR WORLD I GUESS KARAOKE IS HIGH ART! "I LOVE HOW HE TRANSFORMED MY WAY. SO POST-MODERN!"
NOW THAT NO-ONE LISTENS TO JAZZ, YOU CAN ROMANTICIZE IT. BACK IN THE DAY YOU WOULD HAVE BEEN CONDEMNING IT AS "STOLEN SQUEALS AND SQUAWKS" BY PEOPLE TOO LAZY TO WRITE REAL MUSIC.

YOU ARE SERIOUSLY COMPARING WHAT MILES DAVIS DOES IN A SOLO TO WHAT PUFF DADDY DID TO EVERY BREATH YOU TAKE?
HE WAS WRITING A SONG FOR A FRIEND WHO DIED, OK? AND ARE YOU SERIOUSLY SAYING THAT RAKIM'S WORDS, OR EVEN KANYE WEST'S, DON'T RANK AS BRILLIANT LYRICS---AS ART?
I DO ADMIT GOOD RAP IS GREAT POETRY---
I ADMIT I DON'T LIKE AUTOTUNE MUCH---AND SOME SAMPLING IS PRETTY LAZY.
MAYBE IT ALL COMES BACK TO THIS: "BORROWING IS PERMISSIBLE BUT ONE MUST RETURN THE OBJECT BORROWED WITH INTEREST---IMITATIONS--- PRETTIER AND BETTER THAN THE PIECES FROM WHICH THEY ARE DERIVED."
THAT'S NOT CHUCK D, THAT'S "DER VOLLKOMMENE CAPELLMEISTER" FROM 1739. AND ON THAT WE CAN AGREE!
DOES HE CONTRADICT HIMSELF, VERY WELL THEN, HE CONTRADICTS HIMSELF, HE IS LARGE, HE CONTAINS MULTITUDES---

The character concludes that some acts of sampling are more creative than others, and ultimately evaluates sampling through the same lens as other forms of musical borrowing. While the perceived artistry in any given song will depend on the ear of the beholder, artists and critics often place the sonic collages from the golden age of hip hop on the "creativity"

side of the spectrum, while putting uses such as the one in "U Can't Touch This"—where the sample is looped prominently throughout the new song—at the "theft" end. In a TED talk about sampling, artist and producer Mark Ronson described how acts like De La Soul and the Beastie Boys sampled not out of laziness or free riding, but in furtherance of the same kind of creativity that has always propelled music's evolution:

> They weren't sampling these records because they were too lazy to write their own music. They weren't sampling these records to cash in on the familiarity of the original stuff…they were sampling those records because they heard something in that music that spoke to them that they instantly wanted to inject themselves into the narrative of that music. They heard it, they wanted to be a part of it, and all of a sudden they found themselves in possession of the technology to do so, not much unlike the way the Delta blues struck a chord with the Stones and the Beatles and Clapton, and they felt the need to co-opt that music for the tools of their day.

SUMMARY

From a party in the Bronx and DJ Kool Herc came a new sound that took off when hip hop musicians used a new technology—digital samplers—to emulate that sound. As sampling became popular and widespread, it met with a harsher reaction than other musical forms, where there had been a baseline understanding that some acts of borrowing were acceptable. In terms of ethics and aesthetics, some viewed sampling as closer to "theft" than "creativity." This way of thinking was also reflected in the restrictive legal decisions that we have now covered in detail. These decisions laid the ground rules for even more restrictive and elaborate industry practices. The next chapter will delve into those industry practices and discuss some options both for streamlining the sample clearance process and for more efficiently making sample-based music in today's technological environment.

10
Sample Clearance and 2.0

Inside This Chapter

10.1 THE MARKET THAT WASN'T: SAMPLE CLEARANCES..... 259
10.2 A SUMMARY AND A SOLUTION(?).. 273
10.3 SAMPLING 2.0..... 279

The legal decisions discussed in the previous chapter led to extensive sample licensing within the mainstream music industry, which developed clearance practices that sometimes go well beyond what the law would require. These practices have made it prohibitively expensive to produce the kind of sample-based music that flourished during the golden age of hip hop, changing the sound of hip hop and other popular music. There is widespread agreement that the system is flawed, but less of a consensus about how to fix it.

More recently, another set of new technologies has entered the picture—ones that enable people like you, or Barry, to make remixes and mashups, and post them online for anyone to enjoy, without going through traditional distribution channels. This creative universe exists alongside the mainstream route, and each option has its own trade-offs for artists who make sample-based music.

The chapter will start with the sample clearance system. It will then cover possible solutions for making the process more efficient, and finish with internet distribution of sample-based music. If you are interested in learning more about sample clearances, you can read the book *Creative License* (2011) by Professors Kembrew McLeod and Peter DiCola and watch its associated documentary "Copyright Criminals," available on Vimeo. The authors conducted extensive interviews with over one hundred people about the law and culture of sampling, talking to both musicians who sample and musicians who have been sampled, as well as lawyers, executives, scholars, and journalists. This chapter is indebted to their work.

10.1 THE MARKET THAT WASN'T: SAMPLE CLEARANCES

We start by returning to *Bridgeport*, because the decision also offered an **economic justification** for its holding that is worth examining. The court envisioned an *efficient licensing market* for samples that the music industry would develop on top of the "get a

license or do not sample" rule. Reasoning that "it would appear to be cheaper to license than to litigate," the court said that "the record industry, including the recording artists, has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose." The court thought that market forces would prevent its ruling from "stifling creativity in any significant way" because:

> It must be remembered that if an artist wants to incorporate a "riff" from another work in his or her recording, he is free to duplicate the sound of that "riff" in the studio…the market will control the [sound recording] license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording.

In other words, the court assumed that samplers had the alternative option of paying musicians to recreate the desired sound in the studio. In the music business, this is called making a "replay" or "interpolation." In an efficient market, the price of a sound recording license would therefore be capped by the price of making a replay.

This is an attractive theory. Both sides of the transaction would benefit—the sampled artist would get paid so long as they did not price their samples too highly, and the sampling artist could choose to license the samples or recreate them in the studio. This seems nicely to balance existing creators' incentives and future creators' freedom. However, as you will see, this is not what happened. Why? First, the sampler is not always "free to duplicate the sound of that 'riff' in the studio." Unless the sample is non-infringing—for example, by being *de minimis* or fair use—recreating a riff could still require a license from the *composition* copyright holder, who can say "no" or ask for more than the sampler can afford; plus, in practice, restrictive business practices may mean that clearances are required even for those non-infringing uses. Ironically, the climate of fear that the *Bridgeport* court itself generated may have hindered the development of the efficient musical market it so optimistically imagined. Thus the market forces that the *Bridgeport* court assumed would keep the price of a sound recording license "within bounds" may not exist.

Second, *Bridgeport* may not have accurately captured the interplay of aesthetics and market forces. As discussed in the previous chapter, there are times when duplicating a riff in the studio may not satisfy the sampler's creative needs. The original recording may contain a unique sound or significance that the artist is trying to invoke. An artist may feel that it is only by manipulating the authentic original that continuity with our musical heritage can be maintained. In these circumstances, creativity *is* dampened by having to substitute a recreation for the sample.

Finally, it turns out that the music industry did not have the incentives or legal framework to "work out guidelines, including a fixed schedule of license fees"—quite the opposite, actually. In this book, you have learned that what people think of as the law is not a monolithic thing—there is the law on the books, and then there is how things play out in practice. Decisions such as *Grand Upright* and *Bridgeport* laid the legal foundation for

extensive sample licensing. But the sample clearance system that was built upon that foundation is the opposite of what *Bridgeport* imagined. In the book *Creative License,* Professors McLeod and DiCola report "a near-universal opinion that the [sample clearance] system is broken," even among people with divergent opinions about the merits of sampling itself. In *All You Need to Know About the Music Business* (2023)—a book that the *LA Times* called "the industry bible"—author Donald Passman sums up the situation succinctly: "Clearing samples is a major pain in the butt."

So, what happened? *Bridgeport* thought of "sounds" as physical items that could be exchanged in efficient market transactions. **Snippets of sound were turned into commodities, but without the predicates for efficient market transactions**. There is no record of who owns what, or menu of prices, or competitive market forces. Imagine you are painting a picture, but each color is owned by two different people, and you need to clear those colors with them. But there is no database saying who those people are. There is also no set price for the color—if you are able to find the owners, they can refuse to sell to you, or ask for more than you can pay. Plus they will not make a deal with you until they see the finished work. If the owner of blue does not like the painting, she can refuse permission, and you need to go back and replace blue with something else. This is what sample clearance is like.

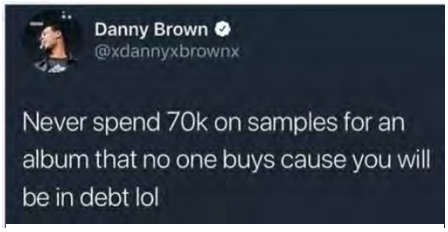
Let's examine the sample clearance process in more detail. To begin with, as we have discussed already, there is the need to clear **two different rights** because of the happenstance that, when you use *recorded* sound, this implicates both the composition right, typically administered by a music publisher, and the sound recording right, typically owned by a record label. Clearing those rights is beset with **administrative hurdles** and sometimes fruitless **search costs**. First you have to find out who owns the rights—something that can be especially difficult for obscure or older tracks. The original copyright holder might have gone out of business or merged with another company, and the rights may have been transferred several times.[39] Once you find the owners, you need to figure out how to get in touch with them, and get them to respond to you. This can also be a challenge. Many rights holders are not willing to talk with you unless you are signed with a label.

If you do manage to reach the copyright owner, they can demand more than you can afford, or just say **no**, in which case the deal falls through. Copyright's exclusive rights mean rights holders can *exclude* certain uses of their works, outside of the boundaries of fair use or other limitations. This is important to artists who do not want to be sampled, or who find the new song offensive or objectionable and do not want to be part of it.

If you *are* able to negotiate on a **price** for the sample, the cost (Photo 10.1) will depend on many factors—the size of the sample, whether it came from a recognizable part of the song such as the chorus or hook, and how famous the artist is. Using the entire chorus from

[39] Both public and private efforts are underway to try and make it easier to find information about music copyright owners. The 2018 Music Modernization Act (MMA) has tasked an entity called the Mechanical Licensing Collective with creating a public "musical works database" that will contain some of this information, though there is no guarantee that this effort will be successful, as it would rely on submissions by copyright holders, and the ability to keep information up to date.

a well-known artist will be more expensive than using a short sample of a guitar lick from a more obscure recording. The cost will also depend on how the sample is used—looping it throughout the new song or featuring it prominently will cost more than weaving it into the background. Because of these considerations, **timing** can be an issue: negotiations often occur *after* a song is finished, so the rights holders can hear how the sample is used. At that point, if they say no, then you have to go back and remaster the song. This gives them considerable negotiating leverage. You could try to clear samples earlier, but because of the experimentation and trial and error inherent in the creative process, you may not know what samples you need until the final track comes together. It is common for releases to be delayed because of sample clearance issues, or for the track to be dropped altogether if the sample cannot be cleared.



Rapper Danny Brown's tweet about sample clearance expenses associated with his 2016 album *Atrocity Exhibition* (Photo 10.1)

Once negotiations are complete, you get to the **payment structure** for samples, which involves some complicated accounting, and curious customs that have developed within the industry. For the sound recording license, you might pay either a running royalty ($x per unit sold) or a lump sum "buyout." According to the experts cited in *Creative License*, buyouts then could start at $500 or $1,000 and skyrocket for samples from superstars; rapper Erick Sermon reportedly paid $100,000 for a single Marvin Gaye sample. Clearing the composition license is different. There, the practice is often to give the owner—the songwriter or publisher—not only a percentage of the songwriting proceeds, but also *co-ownership of the copyright* in the new song. When the rapper Puff Daddy sampled a large portion of "Every Breath You Take" for his hit "I'll Be Missing You" and did not clear the rights up front, he eventually had to give the artist Sting, who holds the copyright for "Every Breath You Take," 100 percent of his songwriting royalties, and co-ownership of the song.

So, what happens if you sample ten songs, and each of the composition copyright owners wants 25 percent ? Then you would have to pay *250* percent of your songwriting royalties, meaning that every time you earn a dollar, you owe that dollar plus $1.50. You would *lose* money with "every sale you make." There is little incentive for the publishers to agree to a smaller percentage just because there are multiple samples—as Passman puts it, their perspective is "my share is really worth 40%. So go squeeze the other guy." This phenomenon is called "**royalty stacking**," and it happens with both composition payouts, and with sound recording licensing fees, which can also add up to more than you take in. Sampling artist DJ Shadow explained: "The problem is, you go to the first person—they want 75% whether they deserve it or not. You go to the next person they want 70%—whoops—you can't cut a pie that many times, there isn't enough pie to go around." Reflecting on the litigious environment following the "Blurred Lines" case, he commented: "I have no problem clearing samples when the clearance is equitable based on the use. But if you're clearing one sample out of 18, and they want 50% and everybody down the line wants 50%, then it's kind

of like, 'Hang on guys, this isn't going to work!' It literally makes the art form illegal and dangerous." He suggests using a musicologist to help divide the pie more fairly, according to the relative worth of each sample to the new song.

All of the hurdles involved in sample clearance mean that artists are much more likely to be able to navigate the process if they are with a label than if they are going it alone. This creates a **divide** between artists who can afford to sample and those who cannot. Major labels have departments dedicated to licensing, and also have back catalogs that their artists can mine for material. Successful musicians such as Drake or Jay Z are more likely to be able to afford a sample than smaller acts, though even superstars still face clearance headaches.

10.1.1 "We Had To Change Our Whole Style"

Restrictive legal rulings, and the clearance practices that developed in their shadow, had the effect of *changing* creativity, and the kind of music that gets commercially released. The "we had to change our whole style" quote above comes from Chuck D, explaining how the need to clear samples altered Public Enemy's music. By and large, sample-based music sounds different now—songs use fewer samples. And it is not just sample-heavy music that has been affected. Samplers hoping to evade clearance requirements disguise samples or stick to obscure source material. Musicians who might otherwise sample censor themselves out of fear of a lawsuit. Should the law be driving creative choices in this way? What would happen to jazz if those earlier musicians needed permission to quote or riff on prior tunes?

The following comic illustrations pick up on these themes, and also refer to the De La Soul story you read about before, and how their earlier albums missed out on digital distribution. One of the characters makes a key point, however: the answer is not simply letting everyone sample for free. For samples that do not fall within copyright's limitations, artists *should* get paid! Later, this chapter will discuss more efficient means for achieving this goal. James Brown also appears in the illustration to express the sentiments of many sampled artists—his point, too, will be explored later in this chapter.

MOST COMMERCIALLY SUCCESSFUL SAMPLERS PAY FOR A FEW BIG SAMPLES AND LOOP THEM...
...SOME STAY UNDERGROUND, HOPING THE SAMPLES WON'T BE RECOGNIZED...
...WHILE A FEW JUST THUMB THEIR NOSES AT THE LAW.
SO THE LAW HAS CHANGED THE CREATIVE PROCESS...
BUT I AM UNCOMFORTABLE. MUSICIANS OUGHT TO GET PAID FOR THEIR WORK. LOOK AT JAMES BROWN, HIS WORK WAS SAMPLED BY PRETTY MUCH EVERYONE!
ANYTHING THEY TAKE OFF MY RECORD IS MINE. CAN I TAKE A BUTTON OFF YOUR SHIRT AND PUT IT ON MINE? CAN I TAKE A TOENAIL OFF YOUR FOOT – IS THAT ALL RIGHT WITH YOU?

SO THE MUSIC THAT BEGAN WITH DJ KOOL HERC, WEAVING SONGS TOGETHER---
COME ON NOW B-BOYS AND B-GIRLS!!
---AND GOT EVEN MORE COMPLEX WITH SAMPLERS LIKE DE LA SOUL AND PUBLIC ENEMY---
---THAT MUSIC IS MUCH SIMPLER NOW.
THINK OF A SONG LIKE PUFF DADDY'S I'LL BE MISSING YOU- IT'S ONE HUGE SAMPLE OF THE POLICE'S EVERY BREATH YOU TAKE---
AND IT'S NOT JUST CREATIVITY, IT'S ACCESS - YOU CAN'T STREAM OR BUY DE LA SOUL'S EARLY ALBUMS ONLINE BECAUSE OF SAMPLE CLEARANCE PROBLEMS.
WE'RE IN THE LIBRARY OF CONGRESS, BUT WE'RE NOT ON iTUNES. PEOPLE KEEP ASKING "YO, WHERE'S THE OLD STUFF?"
PE
PE
EMU SYSTEMS

How cost-prohibitive could it be today to release the sonic collages that Public Enemy, the Beastie Boys, and De La Soul produced during hip hop's golden age? For one calculation, we turn again to *Creative License*. The following illustration (Figure 10.1) is adapted from their chart and estimates how much money the group Public Enemy would have to *pay* if they tried to commercially release *Fear of a Black Planet* today. Beside each track on the

album is the number of identifiable samples within it. Then in the right two columns you see the authors' estimates of the sample license fees: the sound recording royalties are in dollars, and musical composition payouts are shown as a percentage share of songwriting royalties. The authors arrived at these estimates using the kinds of factors mentioned earlier—the characteristics of the sample and profile of the sampled artist, and how extensively the sample was used by Public Enemy. At the bottom, you will see that **if Public Enemy sold $1,500,000 worth of CDs, because of the money they owe in sample license fees, they would be *$6,786,000* in the red.** Keep in mind that this is a thought experiment showing why Public Enemy had to change their sound. It is not a demonstration of what would happen in practice, where Public Enemy's options would be to use fewer samples, try to negotiate some of the prices down, or proceed without clearances and risk a lawsuit.

				Costs	
Track No.	Track Name	Time	Identifiable Samples	Sound recording royalty ($)*	Musical composition share (%)
1	Contract on the World Love Jam	1:44	5	0.20	170
2	Brothers Gonna Work It Out	5:07	8	0.46	365
3	911 Is a Joke	3:17	7	0.32	250
4	Incident at 66.6 FM	1:37	0	0.00	0
5	Welcome to the Terrordome	5:25	9	0.52	435
6	Meet the G That Killed Me	0:44	0	0.00	0
7	Pollywanacraka	3:52	5	0.15	125
8	Anti-Nigger Machine	3:17	12	0.50	435
9	Burn Hollywood Burn	2:47	2	0.13	110
10	Power to the People	3:50	2	0.08	65
11	Who Stole the Soul?	3:49	6	0.48	375
12	Fear of a Black Planet	3:45	4	0.10	85
13	Revolutionary Generation	5:43	6	0.15	135
14	Can't Do Nuttin for Ya Man	2:46	2	0.04	35
15	Reggie Jax	1:35	0	0.00	0
16	Leave This Off Your Fuckin' Charts	2:31	1	0.03	25
17	B Side Wins Again	3:45	1	0.03	25
18	War at 33 1/3	2:07	0	0.00	0
19	Final Count of the Collision Between Us and the Damned	0:48	0	0.00	0
20	Fight the Power	4:42	11	0.60	485
		TOTAL	81	3.73	3120

Retail price of a CD	$18.98
Public Enemy's share of revenue per CD	
Recording artist's royalty	$1.19
Musical composer's royalty	$0.91
Sample licensing fees per CD	
Royalties due to sound recording copyright holders	- $3.73
Royalties due to musical composition copyright holders (3120% share x $0.091)	- $2.84
Net loss per CD (Revenue minus licensing fees)	- $4.47
Estimated transaction costs ($500 per clearance x 162 clearances; i.e., two per sample for 81 samples)	$81,000
Estimated sales of *Fear of a Black Planet*	$1,500,000
Artist's estimated total losses from releasing record	- $6,786,000

**Note:* Figures in the table have been rounded to the nearest cent. Exact figures were used to calculate the totals in the bottom row.

Figure 10.1

The calculations at the bottom of the chart reflect the way artists have traditionally been paid in the recording industry. Here is an explanation. The authors assume that Public Enemy's CD sells for $18.98 retail. Because Public Enemy both wrote and recorded the album, they are entitled to both composition and sound recording royalties, but they only receive a part of the $18.98. As the recording artists, they get just over 6 percent, or $1.19 per unit sold. As songwriters, their payout is limited by the terms in their recording contract. Remember the compulsory license from Chapter Three? Under that license, a maximum of $0.091 per copy goes to the songwriter when someone makes a "mechanical reproduction" of their song. *But* recording contracts cap the number of songs for which a songwriter receives composition royalties at ten, even if they write an album with more than ten songs on it. (This is called the "controlled composition clause" and many artists and commentators have pointed out its unfairness.) So even though there are twenty songs on the album, Public Enemy's total songwriter payout is capped at $0.091 x 10, or $0.91.

For every CD, then, their total revenue is $2.10. But then you have to subtract all of the licensing fees owed for samples, and in the industry, these payments come out of the artist's pocket. From the chart you can see that for each CD, they would *owe* $3.73 for the sound recording licenses, and $2.84 for the musical composition licenses (3,120 percent share x $0.091). Doing the math, this puts them at a net loss of –$4.47 per CD. Add to this average "transaction costs"—costs incurred in facilitating a transaction—of $500 per clearance, which go to lawyers and other professionals for finding and negotiating with rights holders, and Public Enemy would end up losing almost $6.8 million on a successful album. Their form of music has become impractical, even though there are very good arguments that many of their samples are *de minimis* or fair use or both, and thus should not require licenses.

10.1.2 Whose Song Is This Anyway?

The previous chart illustrates the potential impact of what is called "royalty stacking." It is only a hypothetical. In reality, artists would likely drop samples to make the math work out or negotiate lower percentages. Sample clearance practices can also lead to a related kind of accumulation—of *songwriters* with an ownership stake in the new song. Let's call this "author stacking." In Chapter Seven, you learned that after the "Blurred Lines" case, music companies began proactively adding authors of similar-sounding music to song credits, and thus to the list of those entitled to royalties, to avoid costly litigation. Sampling results in adding more authors as well, because of the practice of giving the songwriters of the original song a share of the copyright in the new song.

This means that if you sample from another song, its authors become your fellow songwriters. But what if that earlier song itself sampled, or built upon, other songs, and had to add those songwriters? Then its long list of writers gets appended to your songwriting credits too, even if those writers had nothing to do with the material you actually sampled. In Figure 10.2, if Song B samples a short phrase from the chorus in Song A, the clearance process would add not only the people who wrote Song A as co-authors, but also the people who wrote the unrelated music in the two samples that appear elsewhere in Song A. When songs contain bits and pieces of prior material, and each carries with it a chain of owners, the

list of writers can snowball fast. Even if you sample a few seconds, this ends up carrying forward the credits associated with all the samples elsewhere in the song.

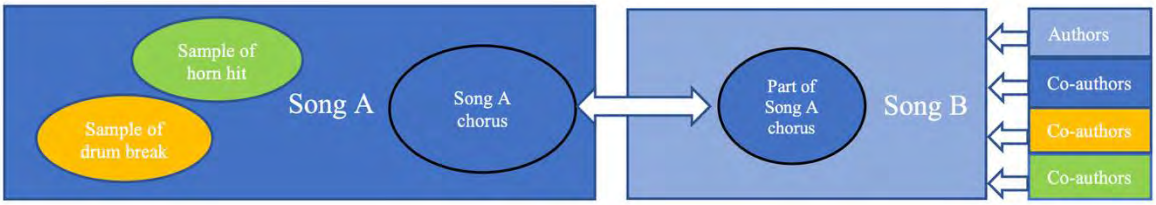


Figure 10.2

The following story, also from *Creative License*, shows how reflexively adding songwriters can play out in absurd ways. It is illustrated with new graphics and details here. It begins with Alan Lomax, a famous ethnomusicologist who collected a large amount of 20th century folk music in America and beyond. You can visit his collection at the Library of Congress online. In the early 1930s, when Alan was still a teenager, he and his father, the folk collector John Lomax, visited the brutal Mississippi State Penitentiary called Parchman Farm, where imprisoned African Americans were forced to do hard labor. The inmates sang work songs rooted in slave traditions, and one of those prison work songs was called "Rosie." Regarding the work songs, Alan later wrote, "these songs belong to the musical tradition which Africans brought to the New World, but they are also as American as the Mississippi River…They tell us the story of the slave gang, the sharecropper system, the lawless work camp, the chain gang, the pen."

In 1934, John and Alan Lomax published a book containing "Rosie," and claimed copyright in the song. Under the law then and now, this copyright is clearly not valid, since the Lomaxes had no part in writing the song. It came from the African-American oral tradition. At the time, however, there was a troubling tradition of folk collectors gaining copyrights over traditional songs after finding and recording them, with dubious claims that they had also "adapted" or "arranged" the song. In Chapter Thirteen, we will discuss how, in this example and countless others, African American artists were routinely deprived of credit and compensation for their work. Claiming authorship and ownership of someone else's work is entirely different from borrowing their work for creative reuse and remix; it is clearly unethical appropriation. True, Lomax preserved music that might otherwise never have been heard by the public, but he also benefited from copyrights that he should never have had. As you will learn, that illegitimate copyright claim has carried forward. As recently as 2015, David Guetta's "Hey Mama" featuring Nicki Minaj had a credit to Alan Lomax, because Guetta sampled "Rosie."

How the Folk Song Collector Alan Lomax Became Co-author on a Jay-Z Song

Adapted from *Creative License* by Professors Kembrew McLeod and Peter DiCola

Listen to the clips

Here is an increasingly attenuated chain of songwriter credits that extends from Lomax to Jay-Z.[40]

Photo 10.2
"Rosie" comes from the African American oral tradition and is "fixed" by the Lomaxes, even though they did not write the song

Credits = John and Alan Lomax

Photo 10.3
The Animals use "Rosie" as the basis for "Inside Looking Out"

Credits = The Animals' Eric Burdon and Bryan Chandler + John and Alan Lomax

Photo 10.4
Grand Funk Railroad covers "Inside Looking Out," adds a new guitar riff

Credits = still Burdon, Chandler, and the Lomaxes. Why? Remember from Chapter Three that when you make a cover song, you do not get the rights over a new composition, just the new sound recording. So Grand Funk Railroad did not get songwriting credit, and the composition credits from The Animals' song remain.

Photo 10.5
KRS-One includes a brief sample of the Grand Funk Railroad guitar riff—and nothing from The Animals' song—in "Sound of da Police," which has the new line "Watch out! We run New York"

Credits = the writers of "Sound of da Police," Lawrence Parker (KRS-One) and Rodney Lemay (producer) + Burdon, Chandler, and Lomax, even though they did not write anything used in this song.

continues

[40] From the liner notes, it appears that the credit that originally went to John and Alan Lomax was eventually condensed to just Alan Lomax. As co-authors, the credited songwriters have a claim to copyright royalties. Does this mean that Jay-Z is sharing royalties with Lomax's heirs? That is more difficult to answer, because it is hard to find the relevant information; the distribution of royalties among all of the listed songwriters is subject to complex accounting and private contractual arrangements. Note that the recording you hear in the audio supplement of "Rosie" is from a later recording in the 1940s, when Lomax returned to the prison to record those work songs with better equipment.

Photo 10.6

Jay-Z samples only the vocals "Watch out! We run New York" from KRS-One in the song "Takeover" from his acclaimed album "The Blueprint"

Credits = the writers of "Takeover," Jay-Z (lyrics) and Kanye West (music and production) + Parker and Lemay who wrote "Sound of da Police" + Burdon, Chandler, and Lomax, carried forward with the chain of songwriters on "Sound of da Police," even though nothing from them appeared in either the Jay-Z or KRS-One songs + more writers for another sample—Jay-Z used a prominent sample from "Five to One" by The Doors, so credited the members of that band: Jim Morrison, John Densmore, Robby Krieger, and Ray Manzarek

Think about this for a moment. In the Introduction, this book quotes from the wonderful book *This Is Your Brain on Music* by Daniel Levitin. Elsewhere in *his* book, Levitin quotes from Robert Sapolsky's *Why Zebras Don't Get Ulcers*. Elsewhere in that book, Sapolsky quotes from D. H. Lawrence's *Lady Chatterley's Lover*. If you quote something from this chapter about sampling in your own book, you do not need to add Jenkins as a co-author, much less do you need to add Levitin, Sapolsky, and Lawrence as other co-authors. That would make no sense. But this is what practices within the music industry can require.

The Jay-Z story was an extreme example, but the underlying practices continue, and exacerbate the phenomenon of **songwriter proliferation**. Today, hit songs have more writers than ever before. Part of this is due to the nature of the creative process, and the collaborations involved in crafting hits. But credits also balloon due to sampling. Take the hugely successful 2018 song "Sicko Mode" from Travis Scott, featuring Drake, which reached #1 on the Billboard Hot 100 chart, was nominated for Grammy awards, and was certified "Diamond"—that's the highest rung, beyond "multi-Platinum." It credits *thirty writers*. Many of those worked on the song, but nineteen of them were appended because of samples and interpolations. The interpolation was from "I Wanna Rock" by "Uncle Luke" and two other songwriters. Guess who "Uncle Luke" is? Luther Campbell again, from the 2 Live Crew case in Chapter Five. Then there is the sample from The Notorious B.I.G.'s "Gimme the Loot," which itself contained many samples. This added fourteen songwriters to "Sicko Mode." Coming full circle, "Gimme the Loot" was the target of a sampling lawsuit filed by…wait for it…Bridgeport Music, which resulted in a $4.2 million verdict that was later reduced to $2.8 million. So, now if you sample from "Sicko Mode," you may need to add thirty songwriters to your own song.

10.1.3 The Artistic Community

Who benefits from all of this? Sample clearances can be frustrating for artists who sample, but what about the original artist whose song was sampled (the "samplee")? Are they at least making money? Sometimes, yes. Sting did very well from his share of the songwriting royalties from Puff Daddy's "I'll Be Missing You." Songwriters typically split this revenue with their publisher, and may get 50 percent of what comes in. This can be reliable income,

and people refer to it as "mailbox money," after the royalty checks that would show up in your mailbox.

However, bad business deals can deprive songwriters of this income. This was the case with Bridgeport Music and George Clinton—Bridgeport obtained Clinton's publishing rights and, as you know, used its collection of copyrights to bring hundreds of lawsuits. It even sued Clinton himself, for sampling his own song! It was Bridgeport, not Clinton, who made millions from Clinton's music. Clinton has long claimed that the underlying transfer of rights was fraudulent and that his signature was forged. In 2005 he won a lawsuit that gave him ownership of the sound recording rights (not the publishing rights) to four of his albums. More recently, he has begun to regain rights to many more songs through another mechanism: something called "termination of transfers," an artist-friendly part of copyright law that allows artists to get their rights back around thirty-five years after transferring them to a publisher or label. Yet even with provisions such as this, Clinton's story reveals how far sampling practice and sampling payment are from the system we might imagine or want.

Receiving sampling revenue can be especially difficult for recording artists because of industry practices and the way recording contracts work. Producing a record costs money, and most songs do not become hits. The labels cover the upfront costs, and are taking the risk that their investment in an artist will not pay off. They rely on proceeds from successful artists to help offset all of the acts that do not succeed. As part of its business model, the music industry has settled on a method of allocating expenses that tends to disadvantage the artist. Because of the way that recording contracts have traditionally been framed—one that is favorable to the labels and unfavorable to the artist—the costs of making an album are effectively charged to the artist, who must pay "recoupable" expenses back to the record label before getting any royalties. This includes the costs associated with making and promoting a song—studio time, equipment, the producer's fees, travel, publicity, making the music video, on and on. As a result, artists frequently receive no royalties until they have paid off not just their advance, but all of these other costs.

It is as if an author writing a book received no royalties until they had paid off not merely the cost of their advance, but also all the costs of printing the book, designing the cover, promoting it through advertising, distributing it, and so on. This may seem surprising but, until recently, it was the way the music industry always worked. It still often is. Some recording artists still do very well, of course. But many artists never recoup, even for a successful album. This is why you hear stories about artists with best-selling albums who are still in the red.

With sampling revenue, the record label often takes a cut of around 50 percent off of the top, but the recording artist does not receive any of the remainder until they are recouped—or until their royalties have gone toward paying everything back. When asked about the impacts of the sample clearance system, entertainment lawyer Whitney Broussard highlighted the fact that unrecouped artists do not get any sampling income. He described how if Artist A samples from Artist B, the money comes out of A's pocket, but never makes it to Artist B because B is not recouped. As Broussard explained, this "makes the artist poorer,

not just the artist who did the sampling, but the whole pool of artistic money and how that gets split up…what happens is out of that $100 that was originally going to be in Artist A's pocket, chances are that none of it is in any artist's pocket anymore." It has "disappeared from the artists' compensation pool."

Some musicians lose out on sampling royalties because they are not eligible for them at all. Because samples are often short fragments of a recording, they may contain only an instrumental or rhythm track that was created by a session musician who gets paid for their time, but does not own part of the copyright or qualify contractually for royalties. Even though that musician created the sound, they are unable to profit from its licensing. Take the "Funky Drummer" riff that has been sampled thousands of times. It was laid down in the recording studio by James Brown's drummer Clyde Stubblefeld, who said that Brown "didn't tell me what to play. I played what I felt, but he owned it." Because Stubblefeld was a session musician, producing what copyright law calls a "work made for hire," he did not see the proceeds from his famous riff. Toward the end of his life, Stubblefeld took matters into his own hands and recorded sample-ready beats himself—allowing anyone to license the sound of the actual Funky Drummer, for which Stubblefeld would receive both credit and royalties.

Music not only builds on the past, as we have discussed, but it is also a collective and iterative process. You could think of the first as a vertical chain of borrowing, and the second as a horizontal web of collaboration. On neither axis does the distribution of reputational and financial rewards necessarily reflect the artistic contributions involved. This is not limited to music. We live in a world of unsung heroes and inadequately compensated labor. But, as we have seen, the way the spoils are divided with sampling can be unfair and sometimes bizarre, from business practices that deprive samplers of income but fail to benefit the artists on the other side of the transaction, to Lomax's claim on Jay-Z's "Takeover."

That said, as was observed in the comic, the answer is not to let anyone sample for free, because then the artists who made the original song do not get paid at all. As you read earlier, the "Amen Break" from The Winstons' "Amen, Brother" is currently the most sampled track of all time. Sadly, The Winstons did not benefit from this success. The copyright holder was the band's front man Richard Spencer, who reportedly did not see any money from the popular sample until 2015, when two British DJs learned that he had never been paid for it and set up a GoFundMe campaign that raised £24,000 for him. The drummer who actually laid down the "Amen Break," Gregory Coleman, died homeless. How can we both allow sampling to flourish, and ensure that the original artists are compensated? Later in this chapter, you will read about some possible solutions.

"Bitter Sweet Symphony"

Photo 10.7

Even when a band attempts to clear a sample, they may discover that they have not done so adequately. In Chapter Eight, you were promised details on a famous sampling dispute that included an "ostinato"—here it is. The band The Verve (Photo 10.7) used a sample for an ostinato in their hit song "Bitter Sweet Symphony" from 1997. The sample consisted of five notes from an instrumental version by the Andrew Oldham Orchestra of the Rolling Stones song "The Last Time." Oldham was a manager and producer for the Stones, and recorded orchestral arrangements of several Rolling Stones songs. The Verve layered the sample in the background of their song, adding their own instrumentation, and got a clearance from Decca, the record label that owned the *sound recording* rights. But then Allen Klein, another former Stones manager who was notoriously aggressive,[41] demanded royalties for the Rolling Stones' underlying *composition* rights in "The Last Time," even though the music that was sampled did not appear in the original Rolling Stones song. It was only in the orchestral remake, but as we have seen, those rights carry forward.

Klein and his company ABKCO Records eventually received 100% of The Verve's songwriting royalties, and The Verve had to give songwriting credit to the Rolling Stones' Mick Jagger and Keith Richards. Then Andrew Oldham piled on and reportedly sued The Verve for $1.7 million for his own share of royalties for the use of his symphonic version. The exact outcome of that lawsuit is unclear, but Oldham got paid as well, and in the end The Verve was unable to benefit from "Bitter Sweet Symphony," even though it was their biggest hit.

This story does have a "sweeter" ending, however. In 2019, Jagger and Richards voluntary signed their rights to "Bitter Sweet Symphony" over to The Verve's frontman Richard Ashcroft, who said it was "a truly kind and magnanimous thing for them to do…It's life-affirming in a way." (Yes, the irony that this song was called "Bitter Sweet Symphony," and the song that muddled the infringement rules was called "Blurred Lines," has not been lost on commentators.) As with other examples discussed in this chapter, the actual "author" of the sampled material was lost in this web of claims and payments—the instrumental track in the sample was not written by Oldham or by Jagger and Richards, but by orchestral arranger David Whitaker, who received no credit at all. Also uncredited was the inspiration for the original Rolling Stones song—Richards acknowledged that "The Last Time" was inspired by the recording "This May Be the Last Time" by the Staple Singers, which was in turn based on traditional gospel songs.

10.2 A SUMMARY AND A SOLUTION(?)

Now you know how the law, and industry customs, have dealt with sampling. **Clearance practices appear to have interfered with two of copyright's central goals: they have neither fostered creativity nor allowed artists to get paid.** What happened? No one

[41] You actually read about Klein in Chapter Six—he was George Harrison's former business associate who, without telling Harrison, went around his back and purchased the rights to "He's So Fine," so that he could collect money from Harrison for subconsciously copying that song.

decided at the outset that "this would be a brilliant way to handle sampling!" and deliberately designed a dysfunctional system. Instead—continuing a theme we have discussed throughout this book—it was the sum of many forces; the result of a dynamic interplay between technology, attitudes, and the law. Technology enabled a new way of making music that seemed, to some, more like theft than creativity. That view was enshrined in a legal decision, *Grand Upright,* that led to restrictive industry practices. Those practices were later amplified by another court decision, *Bridgeport,* which was influenced by everything from the mountain of lawsuits brought by a notorious copyright "troll," to a logical fallacy in statutory interpretation, to a mirage of an efficient market.

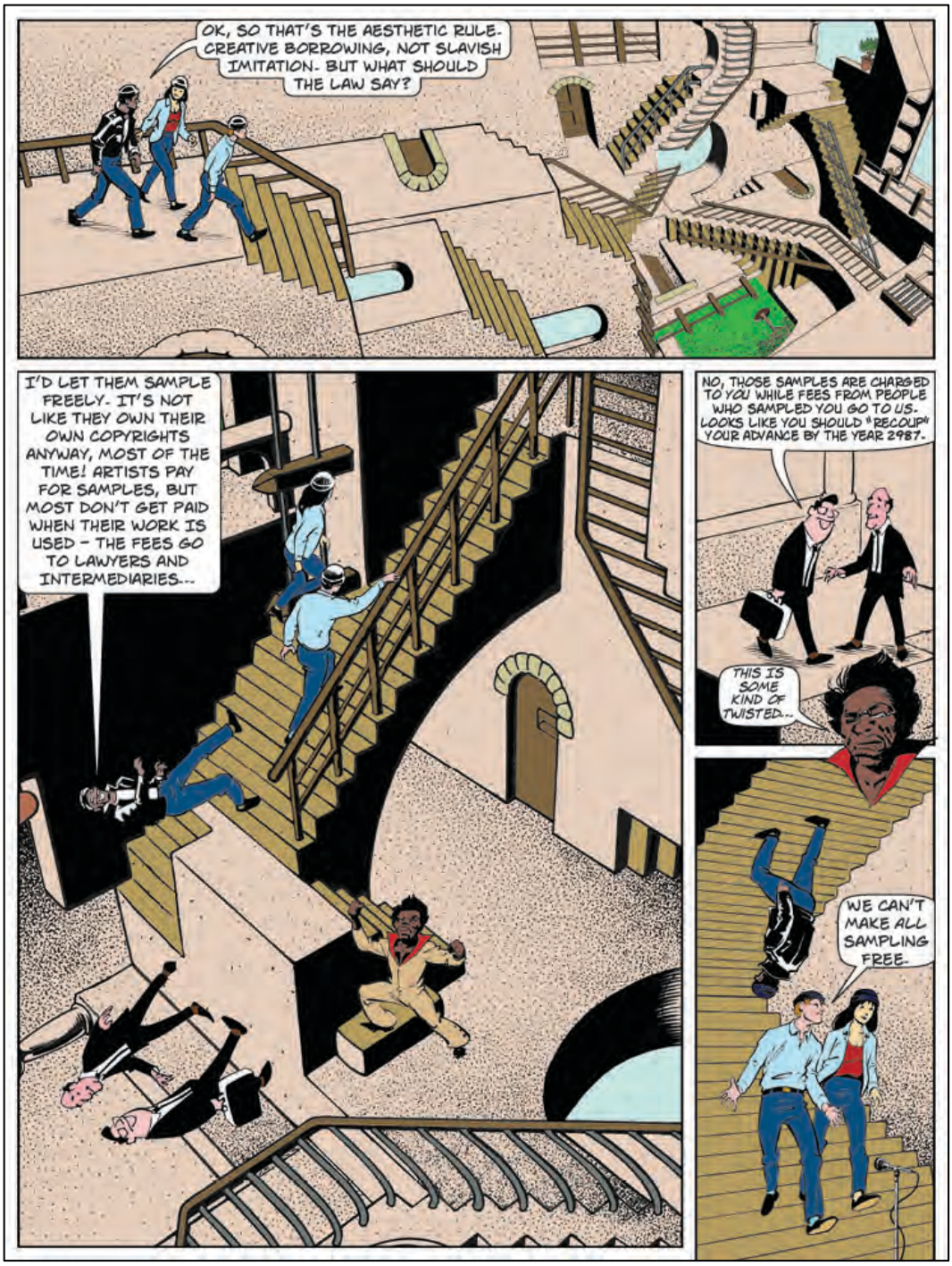
In the end, copyright law was applied to sampling in a way that sidelined some of the law's central features, something more recent court decisions have pointed out. As you learned in earlier chapters, in order to enable creativity, copyright is constantly trying to balance *control* and *freedom*—giving creators ownership of their art, while keeping essential building blocks available for all authors. It strikes this balance with doctrinal rules that outlaw infringement, but safeguard uses that are *de minimis* or do not use a substantial portion of protectable material, or that merit the "fair use" exception. This framework provided a measure of breathing space for music to evolve. However, when sampling was involved, those tools were set aside and replaced with a default practice of licensing everything. The recent court decisions pushing back do not yet seem to have changed that practice.

The problem with implementing a "license everything" rule is that copyright law does not offer the infrastructure necessary for efficient licensing. There is no definitive record of who owns what, because, as you have learned, no "formalities"—such as registration or including a copyright notice—are required to get a copyright. The length of the copyright term means that, as time goes on, it becomes more and more difficult to find this information. The "transaction costs" of licensing are extensive and many negotiations end in deadlock. Add to this the fact that each sample has not just one, but two copyrights attached to it, because sampling uses recorded sound, and Congress had added the separate sound recording right in 1971. That right was meant to stop "record and tape piracy," not to regulate the kind of sampling that did not even exist yet. The extra layer of complexity was the result of happenstance, not design.

Against this legal backdrop, the sample clearance system was turned over to the music industry, where practices developed not holistically, but transaction by transaction, on top of existing customs within different corners of the industry. Structurally, licensing was disconnected from the creative process, and individual incentives were not aligned with the overall efficient distribution of proceeds. This led to logistical hurdles and high prices, and phenomena such as "royalty stacking" for songs with multiple samples and "author stacking" as one song builds upon the next. The result is a web of claimants and revenue streams that bears little resemblance to the sonic contributions in the underlying art and exacerbates the inherent challenges in applying property rights to cumulative creativity. Once practices and expectations are entrenched, they tend to stick. Absent some external catalyst or legal reform, there is little collective will to dismantle the entire system and start again.

While the system persists, there *are* experts who have found a way to navigate its complexities. Deborah Mannis-Gardner, who has been dubbed the "Queen of Sample Clearance," has developed an impressive practice with the expertise and relationships to tackle sample clearance. She explains that she "takes great pride in aiming for the fairest deal for all parties involved."

So the question is not *whether* sample-based music can exist and thrive; it clearly does. The question is *what* kind of music has been thwarted by clearance hurdles—what artists were unable to become the next Public Enemy or De La Soul, what sounds we have missed out on, and what could be produced under fairer and more efficient system. This leads to the question: if we were to reform the law in this area, what *should* the law say? Let's hear from our comic book characters on that question.


OK, SO THAT'S THE AESTHETIC RULE- CREATIVE BORROWING, NOT SLAVISH IMITATION- BUT WHAT SHOULD THE LAW SAY?
I'D LET THEM SAMPLE FREELY- IT'S NOT LIKE THEY OWN THEIR OWN COPYRIGHTS ANYWAY, MOST OF THE TIME! ARTISTS PAY FOR SAMPLES, BUT MOST DON'T GET PAID WHEN THEIR WORK IS USED – THE FEES GO TO LAWYERS AND INTERMEDIARIES--
NO, THOSE SAMPLES ARE CHARGED TO YOU WHILE FEES FROM PEOPLE WHO SAMPLED YOU GO TO US- LOOKS LIKE YOU SHOULD "RECOUP" YOUR ADVANCE BY THE YEAR 2987.
THIS IS SOME KIND OF TWISTED--
WE CAN'T MAKE ALL SAMPLING FREE-

WHEN BIZ MARKIE OR MR. COMBS TAKES A LARGE CHUNK OF A SONG TO MAKE A NEW COMMERCIAL PRODUCT THEY SHOULD PAY FOR THE PRIVILEGE.
YES. BUT EVERY JAZZ MUSICIAN WHO USES CHORDS FROM I GOT RHYTHM DOESN'T NEED A LICENSE...
...IS JUST TOO SMALL TO BOTHER ABOUT.
AT SOME POINT WE HAVE TO SAY THAT SOME LEVEL OF BORROWING...
EVEN JAMES BROWN BORROWED FROM GOSPEL SONGS, AND FROM RAY CHARLES' SOUL MUSIC.
REQUIRING PERMISSION FOR TRIVIAL BORROWING STOPS COPYRIGHT FROM FULFILLING ITS GOAL...
...TO ENCOURAGE CREATIVITY!

The comic excerpt reiterates Mr. Broussard's point about how the clearance process can deplete the money within the artistic community—sampling artists pay the licensing fees, but that money gets absorbed by lawyers and intermediaries before reaching the sampled artist on the other side. The excerpt concludes by returning to copyright's balancing act: in order

to encourage creativity, some samples *should* require a license, but those that qualify as *de minimis* or fair use should not.

When licensing *is* necessary, how could we make it more efficient? Many commentators have proposed using a **compulsory license** akin to the one you learned about in Chapter Three. That license allows you to make a recording—including a cover version—of a musical composition, so long as you pay a set fee, and do not change the underlying song's "basic melody or fundamental character."[42] It does not extend to sampling, which is different from simply recording a song; sampling uses pieces of earlier *recordings* within new and different "derivative" works. A compulsory license for sampling would legalize it—in hip hop, remixes, mashups, and other genres and forms—as long as the sampler's money is shared in some way with the owners of the musical composition and sound recording rights in the samples. This is **a potential win-win solution**—by enabling sampling, it would support creativity and allow a wider variety of sample-based music to reach the mainstream market, *and* it would also let the sample's copyright holders get paid. After all, when the friction within the current system undermines a potential deal, no one gets paid.

To be sure, there are challenges associated with such a compulsory license. Rights holders would lose their ability to veto samples they find objectionable, or to charge their desired fee. Determining the royalty splits would be more complex than setting the going rate under the existing compulsory license for making "mechanical reproductions" and cover songs. The amounts would likely need to reflect the length and nature of the sample and how it is used, and with sample-heavy songs, the accounting could get complicated fast. While the licensing scheme would solve the royalty stacking problem by capping the total revenue shared at 100 percent, it is more difficult to ensure that more of this licensing revenue reaches the sampled artists, since that is governed by private agreements and practices.[43] Finally, there is the danger that the compulsory license could displace non-infringing uses that legally should not require a license at all. This could be mitigated by making unrecognizable samples, and recognizable ones under a certain length, exempt from the licensing requirement. Samplers who think that their uses are safeguarded under *de minimis* or fair use could proceed without a license, and invoke those exceptions in court if they are sued.

Proponents of a compulsory license argue that its benefits ultimately outweigh these challenges. At the moment, however, it appears unlikely that Congress would be motivated to enact such a scheme. In the absence of legislative action, we often see innovative solutions that employ technology, entrepreneurship, and private legal arrangements. Today, many of these solutions intersect with another technological revolution: the one you are living in right now.

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[42] As you learned in Chapter Three, you own sound recording rights over your cover song but do not own rights over it as a new musical composition because in theory, by maintaining the "fundamental character" of the first song, you have not created a "derivative" work. This is what happened with Grand Funk Railroad in the Alan Lomax/Jay-Z story: they were not credited as songwriters because they made a cover version, not a new song.

[43] Of course, record companies and intermediaries—including agents and even lawyers!—have important roles to play in our music industry. The artist is not the only one contributing to music reaching the public. Still, it strains belief to argue that the current system is either efficient or just where artists are concerned.

10.3 SAMPLING 2.0

We will conclude with the landscape for sampling as of 2021. This could be another golden age of sampling and remix. You have more music available to you than ever before—instead of crate-digging through a few hundred records, you can find millions of songs online. You do not need special equipment—the tools for sampling are at your fingertips, with the software on your computer or phone. There's no need for a record label to distribute your work to the masses; you can just post it on the internet. And if you look on the internet, you will find remixes and mashups galore.

So, does this mean that technology has solved the problems we have been discussing in this chapter? Not quite. What we have is a stratified sampling culture. In the stratum of mainstream distribution channels, strict clearance practices remain the norm. If you sample and want to release your music with a major label, or have it used in movies, TV shows, or ads, this is still your world. What is the current state of sampling in this sector? It appears that sampling is alive and well, but that the problems with sample clearance also persist. The company Tracklib has crunched the statistics and provided an annual overview of the "state of sampling" in popular music. Its research shows that for five years running, 50 percent or more of the top twenty-five albums contained samples. At the same time, the clearance process continues to cause headaches: the 2020 report provides numerous examples of how "this year we've seen how uncleared samples can obviously lead to (massive!) album delays" and explains that "sample clearance remains an uphill battle." So, who is sampling, and what is being sampled? As mentioned before, we no longer see the kinds of sample-heavy albums from hip hop's golden age, at least in mainstream music. Albums contain fewer samples, but the practice of sampling has also spread across genres and the sources for samples span decades and go well beyond drum breaks.

Outside of the mainstream is the stratum of freer sampling and **underground or internet distribution**. Here, sample-based music runs the gamut from unsigned artists using a few samples in hip hop or electronica to remixes, mashups, mix tapes, and other sample-heavy music that is released without having to navigate the sample clearance process. This is Barry's world, because for him—as with other remix artists—sample clearance is impractical. He cannot reach some rights holders, and for those he can reach, the cumulative prices are astronomical and some owners would simply say "no." But he has an alternative outlet for his creativity. The internet has been a game changer for remix artists, who no longer need a record label to reach an enormous audience. "Underground" artists can now be very visible indeed.

This sector, too, is alive and well; but it also has **trade-offs**. First, while artists who choose this route enjoy creative freedom and sometimes have successful musical careers, they have to **forgo the benefits of mainstream distribution channels**, such as the backing of a record label for production and promotion, and the money that comes from traditional revenue streams. Many rely on live performances,[44] crowdfunding, or other kinds of fan

[44] In general, it is easier to clear samples in live performances because of the way the copyright owner's "public performance" rights are handled. As you learned in Chapter Three, there is no general public

support to fund their art, as they see little if any ad revenue from sites such as YouTube. If they cross over to the mainstream, though, they may need to go back and clear the samples in their older songs. Early in his career, the rapper Lil Wayne sampled freely for his mixtapes. Now, releasing those mixtapes on streaming platforms requires post hoc sample clearances. When Lil Wayne released his 2009 mixtape "No Ceilings" in 2020, he had to drop nine of the original tracks due to sample clearance problems.

Second, samplers who proceed without clearances have to weigh the **risk of getting sued**. Conventional wisdom suggests that lawsuits are less likely for obscure or disguised samples because they can avoid detection, and for tracks that are not commercially successful because a lawsuit might not yield a profitable result. But there are no guarantees either way.

Girl Talk performing live (Photo 10.8)

You have already read about lawsuits against numerous artists for sampling without permission. Many other artists have managed not to be sued. The most prominent remix artist who has sampled freely is **Girl Talk**, (Photo 10.8), whose given name is Gregg Gillis. The name of his record label was, appropriately, "Illegal Art." Gillis is known for skillfully weaving together samples, and for his energetic live shows, where he has to cover his laptops with plastic wrap to protect them from sweat. His popular 2008 album *Feed the Animals* featured over 300 samples.

So, why hasn't he been sued? One theory is that he is an unattractive target. He might *win* on fair use grounds, widening its protection for remixes and mashups. His works are certainly "transformative," both in the unusual juxtapositions that recontextualize and show the modularity of earlier music, and in the new sound this creates. His popularity could also make him a folk hero or create bad PR for the people suing him. Either way, the outcome of a lawsuit may not be worth throwing the dice. In addition, many artists just think his music is really *good*, and are delighted to be sampled on it. In 2020, Gillis offered his own explanation to *Billboard* magazine: "We believed in what we were doing, that this music deserves to exist and should be allowed. I think part of the reason we didn't have issues was the warm response from fans and critics." Gillis views mashups as a vehicle for discovering the sampled artists: "I always thought, 'This isn't causing any damage to anyone.' I still hear people like, 'I never heard of so-and-so artists until I heard that sample.' I never thought of it as competition. No one's going to be listening to this instead of the artist. If anything, people are learning about new artists."

Girl Talk's popularity and success has led to more mainstream distribution arrangements. These days you can find most—but not all—of his early albums on streaming services, thanks to post hoc licensing deals with rights holders. And in 2022, he released the new album *Full Court Press*—in collaboration with Wiz Khalifa, Smoke DZA, and Big K.R.I.T.—with all

performance right for sound recordings, and for the musical compositions, there are blanket licenses that music venues will cover. So fewer clearances are required because the performance does not directly implicate copyright's other "exclusive rights" of copying or distributing the song.

of the samples *cleared*. He told *Rolling Stone*: "When we were done, I was thinking, I don't even know if this can come out! Can anyone afford to put it out? I'm not used to dealing with actual labels with a sample clearance team, so it was educational going through that process." In one instance, clearance hurdles meant that they had to rely on an interpolation rather than the original recording. As with De La Soul's *And The Anonymous Nobody*, Girl Talk's *Full Court Press* shows creativity can find a way to flourish despite the difficulty of licensing samples. But the need to find work-arounds or deal with licensing alters the creative process. The next young artist—still starting out—may not have the reputation or connections that Gillis built up while making his "illegal art" or the benefit of a sample clearance team.

The Grey Album (Photo 10.9)

An earlier mashup album illustrated both the potential pitfalls of bringing legal claims against a popular artist, and the trade-offs of underground distribution. In 2004, **Danger Mouse**, whose given name is Brian Burton, created *The Grey Album* (Photo 10.9), a mashup of Jay-Z's *The Black Album* and an album from The Beatles nicknamed the *White Album*. The Beatles' Paul McCartney did not object to the mashup. Nor did Jay-Z, who had released an *a cappella* version of *The Black Album* so that people could "remix the hell out of it." However, EMI, the company that owned The Beatles' copyrights, felt differently, and sent cease and desist letters claiming copyright infringement in an attempt to stop *The Grey Album*'s distribution. The plan backfired—hundreds of websites offered free downloads on a day dubbed "Grey Tuesday," and it was downloaded over one million times. But, because it could not be sold, no one got paid, though Danger Mouse did receive exposure and has since had a successful music career. Were a compulsory licensing scheme in place, the album could have generated profits for Danger Mouse, Jay-Z, The Beatles, *and* EMI.

Aside from forgoing the benefits of mainstream distribution and the possibility of direct legal claims, the third trade-off of the internet distribution model is that it comes with a certain amount of **instability**. Online, what goes up…can always come down. For someone like Barry, it is difficult to get music with uncleared samples onto services such as Spotify or Apple Music.[45] Instead, he uploads his remixes to platforms such as YouTube or SoundCloud. Because they host material uploaded by *users*, rather than streaming it directly, they are covered by a law called the Digital Millennium Copyright Act that safeguards them from copyright liability so long as they promptly remove infringing material upon notification by the copyright holder.

[45] Their default appears to be offering only fully cleared music, unless there is a licensing deal or some other behind-the-scenes reason to accept it. In addition, the aggregators that help independent artists get their music onto these services do not currently take music with uncleared samples. Spotify does allow for some direct user uploads—mashup artists have found a workaround by using Spotify's podcast feature, for example. For a brief period, Spotify allowed direct uploads via Spotify for Artists, but it stopped this feature in mid 2019. But overall Spotify employs measures to detect and remove unlicensed material on its service and explains: "We work hard to make sure that all of the content on Spotify is fully licensed so that we can compensate the people who have made it."

YouTube and SoundCloud have also implemented automated systems that give copyright holders the option to block uploads containing material over which they claim copyright. For samplers and remix artists, this means that their music can reach millions of listeners, but is also at risk of being taken down. In 2014, SoundCloud pulled 70 percent of mashup artist DJ Kaskade's music from its platform because it contained copyrighted material. In response, DJ Kaskade expressed his frustration not only with the interference with his own art but with the opportunity for people to discover the music he sampled: "We can't love music we haven't heard...Having the means to expose music to the masses is a deft tool to breathe new life into and promote a song. It's the most compelling advertising, really." We will explore the legal rules surrounding music platforms on the internet—from YouTube and SoundCloud to Spotify and Apple Music—in Chapter Eleven.

The good news is that the marketplace has changed, and there may be a trend toward enabling more widespread availability of sample-based music. This trend has been buoyed by the popularity of user generated content—including DJ mashups—as a marketing tool.[46] Private initiatives have stepped up to enable more friction-free sampling, with solutions ranging from sample libraries, to open licensing, to building a "middle layer" that will facilitate clearance and payment. TikTok is also worth a mention—it has licensing arrangements that enable the sampling of music covered by those licenses within TikTok videos, leading to all sorts of reuses of recorded music. We will discuss TikTok in more detail in Chapter Twelve.

One source for samples is **Tracklib**, an **online marketplace** designed to make "sample clearance fast, easy, legal and affordable." (Fun fact: like Spotify and Soundcloud, Tracklib was founded in Sweden.) Launched in 2018, Tracklib offers the kind of efficient licensing system envisioned by *Bridgeport*, though achieved through very different means. Essentially, Tracklib serves as an intermediary between the sampler and copyright holders and has deals with the copyright owners that allow it to offer a "record store" for samples. It features original recordings, instead of prefabricated sample packs, and lets musicians "crate dig" through its curated collections. Musicians sign up on a subscription basis and can download and experiment with tracks they find interesting. Artists who have released music using Tracklib samples include DJ Khaled, Lil Wayne, and Mary J. Blige.

In addition, there is a thriving marketplace for **beat licensing**, something you may be familiar with from TikTok or other platforms. This is different from the kind of sampling we have been talking about in this chapter—instead of taking bits and pieces from earlier recordings, people license loops and beats from sites like BeatStars or Airbit, where producers have made pre-packaged beats available. The word "license" is key: if you license a beat, this does not mean you own it, indeed it is sometimes referred to as "leasing" the beat. As with sampling, you will be sharing both royalties from your new song and songwriting

[46] Many of the DJ mixes you find online are licensed and seen by rights holders as a promotional tool. The use of tracks in these mixes is treated differently than the use of samples. Spotify and Apple Music have offered DJ mixes as albums, with efforts to ensure that payments flow to the owners of the songs in those mixes. YouTube, SoundCloud, and Mixcloud have used content management systems to identify tracks in DJ mixes and compensate owners.

credit with the beat producer. There are different tiers of licenses. Cheaper licenses only offer "nonexclusive" rights to use the beat, meaning that other artists can use the same beat in their songs. Importantly, these licenses expire: they are limited in *time*—ending after a set term and needing to be renewed, or *usage*—stopping after a specified number of streams or downloads of the new song. More expensive licenses will be "exclusive," meaning no one else can use the beat, and will not have those limits on timing or usage.

What if the beat contains…a sample? Then you need to clear rights to the sample within the beat; it is not covered by the beat license. Lil Nas X discovered this with his breakout hit "Old Town Road," which built on a beat by YoungKio that he purchased for $30 from BeatStars. The beat had an uncleared sample from the Nine Inch Nails song "34 Ghosts IV," written by band members Trent Reznor and Atticus Ross. When "Old Town Road" became successful, Lil Nas X had to clear the sample. Reznor and Ross could have asked for 100 percent of royalties or stalled the song's distribution, but in this case negotiations went smoothly. Reznor recalls receiving "a call from a panicked manager" and reports that he said: "Look, I'm fine with it. I get how stuff goes. They're not saying they didn't sample it. Just work it out, but don't be a roadblock to this." This seems magnanimous but Reznor and Ross reportedly ended up settling for 50 percent of songwriting royalties, with Lil Nas X and YoungKio sharing the remaining 50 percent. This gave Reznor partial ownership of "Old Town Road" and even a Country Music Association award as one of its writers. Does this mean the system is working? Here, everything worked out—the song is still available and Lil Nas X has become famous. But that is not always the case.

Another caveat connected to nonexclusive beat licenses involves a new kind of "copyright troll." If you lease a beat and your song starts to go viral, a company might find the owner of that beat and buy it out. They will then enjoy not only a share of your viral song's income but considerable negotiating leverage to demand higher rates when you try to extend the beat license. Twenty-year-old Caleb Hearn discovered this after his moving song "Always Be," about the death of his childhood friend, gained traction on TikTok. Hearn had paid $19.95 for a nonexclusive license for an instrumental beat that lasted for either 10 years or up to 500,000 streams. When "Always Be" started to blow up, a company called '94 Sounds purchased the underlying beat, then contacted Hearn to negotiate a new deal. Hearn posted on TikTok that the company's owner "completely took advantage of me and the song" and released a new version of "Always Be" with a different beat.

Musicians can also find *royalty-free* samples online that are made available under **open licenses**. Open licenses include music made available under **Creative Commons** ("CC") licenses, something we will explore again in the next chapter. These licenses can apply to anything that is subject to copyright—not just music, but photos, art, books, videos, websites, blogs, and more. This book comes to you for free (at least digitally) under exactly such a license! Artists use these licenses to allow others to more

freely share and reuse their work. You can find CC-licensed audio[47] online on many websites, including Bandcamp, the Free Music Archive, CCMixter, and SoundCloud.

The options for CC licenses are summarized below. Creators can choose to attach these conditions in multiple combinations. Some choose merely to require attribution—everyone may legally copy their work so long as they properly credit the author. Others require that the copying be limited to noncommercial use, or that the work be copied unchanged, in its entirety. Still others allow modifications or derivatives but require that the new work be released under the same license, giving future users the same freedoms that the remixer was given originally.

Attribution You must credit the author the way they request; all CC licenses require this

Non-Commercial You can only use the work for non-commercial purposes

Share Alike If you build upon the work, for example by using it in a remix, you must make your new work available under the same licensing terms as the original, keeping it free for future creators

No Derivative Works You can only use verbatim copies of the work, and cannot modify it or incorporate it into new works

You will often see CC-licensed works marked with a button that combines the icons shown above, such as the one to the right. For sampling and remix, for anything that goes beyond *de minimis* or fair use, you need to look for a license that does *not* have the No Derivative Works "=" icon, because you will be making a derivative work. It is important to be clear, however. If your uses fall into one of copyright's exceptions such as fair use, then neither copyright law nor the license restrict you. After checking for whether or not derivative works are restricted, you should then check whether there are other icons indicating that you have to stick to noncommercial uses, or share your new work under the same license. For example, if you see the license above attached to an audio file, it tells you that you can sample from it, as long as you credit the author and keep your usage noncommercial. The license I applied to this book lets you share or copy it freely, and even to modify it—everything from an abridgement to a translation—so long as your use is noncommercial, you correctly attribute me as the book's author, and you indicate whether the new version is modified. If your version is modified, you must keep the new work free for future creators under the same terms I applied to this book. The aforementioned options are all "some rights reserved" licenses. Creative Commons also provides the "public domain" deed that allows a copyright owner to waive their rights entirely and dedicate their work to the public domain.

[47] When these audio files are from creators who both write and perform the music, the license can cover both the musical composition and sound recording rights.

Finally, startups are building a **middle layer** containing the technological and legal infrastructure for facilitating the complicated clearances and royalty streams that attach to music such as remixes and mashups. If they succeed, this could result in a more streamlined way to put sample-based music online *and* let rights holders get paid.

The foregoing options all dealt with copyrighted material—of course, anyone is free to sample **public domain recordings**. Without a central repository or public domain dedication, however, this can require searching for works that are nearly a century old, and by that time many sound recordings have been lost to decay or obscurity before anyone was able to digitize them legally. For the recordings that have survived, January 1, 2022 was a big date, because under the Music Modernization Act, that is the date when all sound recordings published before 1923 officially entered the US public domain. The underlying compositions were already in the public domain because they were over ninety-five years old. Recordings will continue to enter the public domain on a gradual basis, with recordings published from 1923 to 1946 entering the public domain on January 1, 2024 through 2047, after a 100-year term.

SUMMARY

In the end, **sampling is here to stay**. As a creative practice, it exists within an ever-evolving framework that determines whether and where sample-based music is available, and who, if anyone, gets paid.

Throughout this book, we have talked about the interplay between creativity, technology, law, and business practices. These threads all came together with music sampling. Technology enabled a new way of making music. But the law did not look kindly on digital sampling, and business practices responded with a cumbersome and expensive sample clearance process. Songs were not released until all samples were cleared. This changed the music that could be made, as it was no longer practical to release the kinds of sonic collages produced during hip hop's golden age. These practices continue to shape both the way chart-topping albums sound and the way that artists are compensated, at least within the mainstream music industry.

Outside of the mainstream, technology has opened new doors for sampling. Artists can make remixes and mashups and share their music with thousands of fans online. Though creativity can thrive, there are downsides to internet distribution. Often the copyright owners of the original songs do not get paid. Many sampling artists also miss out on the revenue that would come from traditional markets, and have to deal with uncertainty over whether they will be sued, or have their music taken down. There is nothing inevitable about all of this. The framework *could* be made better. With a compulsory licensing scheme, both samplers and samplees could make money from profitable projects, and more sample-based music could flow through mainstream channels, reaching potential fans of both the new music and the original songs that were sampled.

Things may be changing, however: enterprising private solutions are using technology and contracts to enable efficient licensing and a well-functioning market. In fact, many of the initiatives you have just read about, from Creative Commons licenses to one-stop shops for license clearance, were conceived of as private "hacks" to get around the limitations in the copyright system. Here is a lesson for those of you interested in entrepreneurship: every *inefficiency* is also potentially an *opportunity* for commercial or charitable innovation to help solve the problem.

The next chapter will move on to another series of technological developments: the MP3 file that made it possible to share *digital* music, freed from physical embodiments such as vinyl records and CDs, and the peer-to-peer services that made that sharing exponential on this (then) relatively new thing called the *World Wide Web*. Illegal downloading became rampant, upending the recorded music business. As this cycle of technological disruption was happening, copyright law was evolving to deal with the internet—from file sharing services to sites that host user generated content to online marketplaces. The next chapter will cover this evolution: from the lawsuits that shut down the peer-to-peer services Napster and Grokster, to the law that allows platforms such as YouTube to operate legally and the licensing rules that apply to streaming services such as Spotify.

11
Creative Destruction

Inside This Chapter

11.1 "CREATIVE DESTRUCTION IN REAL TIME" 287
11.2 SECONDARY LIABILITY FOR INFRINGEMENT 295
11.3 THE DIGITAL MILLENNIUM COPYRIGHT ACT 302
11.4 TANGLED UP IN LICENSES 309

As you have learned in this book, with music, disruptive technologies are nothing new. Chapter Three featured a timeline showing a succession of new technologies, from Edison's first phonographs to piano rolls, vinyl records, and CDs. This chapter picks up at the end of that timeline, with the MP3 file and digital music delivery. Peer-to-peer file sharing services allowed people to get music for *free,* presenting what seemed to be an existential threat to the recorded music business. Lawsuits followed. We have seen the law react to new technologies before. With the arrival of player pianos and sound recordings, we got the compulsory license for mechanical reproductions, and decades later the Ⓟ sound recording right. As radio grew, courts made clear that broadcasters had to pay fees for publicly performing musical compositions. How would the law respond to this new round of technological change?

After copyright lawsuits, file-sharing services such as Napster, Grokster, and LimeWire were shut down. But those legal cases were part of a bigger transition as copyright law met digital technology and the world wide web. Copyright became a locus not only for *content regulation*—determining when one *song* infringed another—but also for *technology regulation*. In the digital world, millions of people are sharing copyrighted material, all the time. The scale of potential infringement is enormous, as is the potential for free speech and community formation. Threat along with promise. Suing everyone for copyright infringement is impractical; it is more effective to stop the *technology* that lets them do it. The question becomes: when should technology producers be liable for the infringing activity of their users?

A lot of technology gives you the ability to violate copyright law—your phone, computer, and social media platforms all allow you to copy and share content owned by others. But these technologies also allow a wide range of entirely *legal* activity. How do we afford meaningful copyright protection without impeding their technological development?

This chapter will cover two key parts of copyright law that try to strike that balance: something called "secondary liability" and the Digital Millennium Copyright Act (DMCA). It will also go beyond the law and examine automated content management systems such as YouTube's "Content ID" system, which play an immense role in determining how content is handled online. Finally, turning to the streaming economy, it will examine the copyright licensing rules that apply to services such as Spotify. It is time for copyright law—the internet edition.

11.1 "CREATIVE DESTRUCTION IN REAL TIME"

In *Capitalism, Socialism, and Democracy* (1942), the economist Joseph Schumpeter described capitalism as something that is perpetually "in motion," driven by "the perennial gale of creative destruction." As old business models are destroyed, new ones are created to take their place, bringing with them new products, jobs, and markets. This perennial gale can take many forms. Around a century ago, when automobiles became widely available, they literally drove out the need for horses and buggies. Gone was the demand for farriers, groomers, saddlers, coachmen, stable keepers, wainwrights, and wheelwrights. The new need was for people and firms who dealt with cars.

Enter Ford and General Motors and all of the technology that goes into engines and tires and other components. Enter mechanics, parking garages, gas stations, and taxi companies. Fast forward to today and there is a new round of disruption. Uber and Lyft are displacing taxis. Electric vehicles are on the rise. My electric car has an output of over 600 "horsepower." The old world lives on in our language, long after the economy has changed. "Broadcast" technologies are described using a term derived from a method of throwing, "casting," seeds widely onto a field. And now broadcast itself is being displaced in many places by "streaming." The technologies shift under our feet, leaving only archaeological traces in our speechways of the world that used to be.

When digital technology and the internet came along, Schumpeter's gale blew especially hard, wiping out a wide range of business models and forcing new cycles of innovation. Not so very long ago, people were using travel agencies to book flights and hotels, going to Blockbuster stores to rent movies, and buying Kodak film for their cameras—all of these used to be big businesses. Now you book trips yourself, watch movies on Netflix, and take digital photos with your phone. Within creative industries, firms across the board—publishing houses, movie studios, newspapers and magazines—were affected as content became digital and went online. But the *recorded music* industry was the first to crash and, eventually, to adapt. As the economist Will Page put it in the book *Tarzan Economics*, music was the "first to suffer and first to recover."[48] Here is how Professor Alan Krueger described the experience: "Economists rarely get to see such creative destruction in real time. It's as if

[48] Will Page, *Tarzan Economics* (2021). Mr. Page was formerly the Chief Economist at Spotify. Both *Tarzan Economics* and *Rockonomics* – featured in the next endnote – are fascinating and will be referenced several times in this chapter.

Darwin was able to observe species evolving before his eyes while he visited the Galápagos Islands."[49]

Here is the story of the music industry's wild ride. For an illustration, examine Figure 11.1. It shows revenues from recorded music over the span of almost half a century. As you can see, earnings peaked in 1999 then steadily plummeted for 15 years, bottoming out in 2014 and 2015. In 2016 things began to tick up again, and this trend is likely to continue. You are living in that recovery period. Note that the chart only shows revenues from *recorded* music; these numbers do not include revenues from live music and other sources. The broader music economy—including all revenue sources—has largely grown over time, but for a period the sale of recorded music took a smaller share of that market.

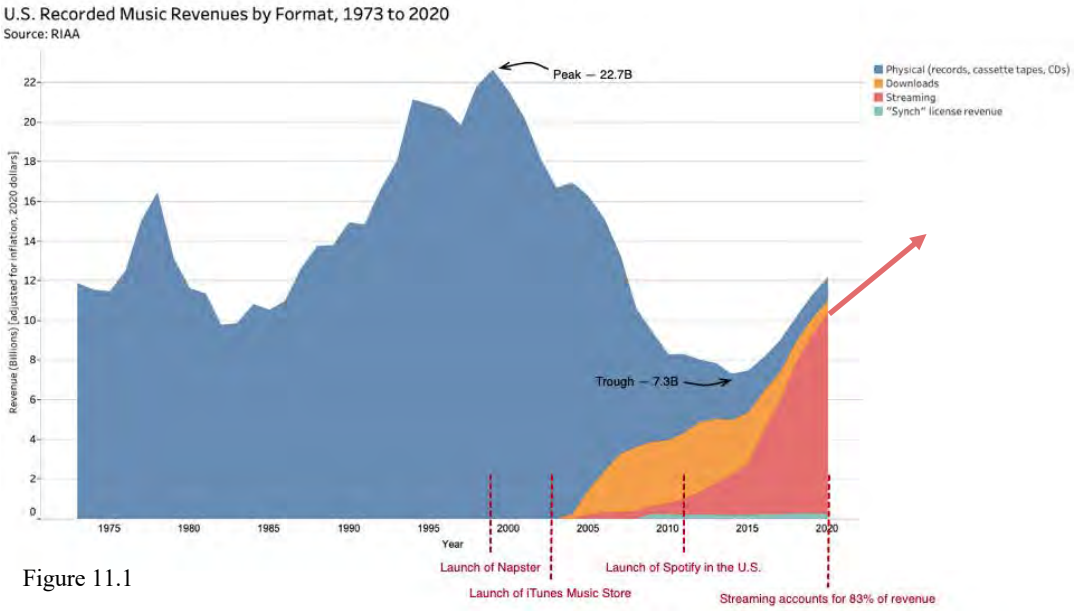


Figure 11.1

The blue shading indicates the way people used to buy music: on physical formats such as vinyl records, cassette tapes, and compact discs (CDs). At the high point in 1999, the music business was booming. Boy bands were big—that hasn't changed—but if you wanted to play a new song by your favorite boy band, you could not go to Spotify or YouTube to hear it. Instead you would go to a record store and buy their latest *album* on a CD—the shiny thing in Photo 11.1—that probably cost between $14 and $19. Let us use $15 as a low estimate. It might have one or two "killer" hits that you liked. The rest were "filler" songs that you had no interest in buying, but you had to anyway because all of the songs came bundled together. More than 170 million Americans were buying CDs. At $15 each, this was a good business model. Add to this the fact that some people were buying CDs of albums they had already purchased on other formats. Historically the format obsolescence

A compact disc or "CD" (Photo 11.1)

[49] Alan Krueger, *Rockonomics* (2019). Mr. Krueger was the former chair of the White House Council of Economic Advisers.

that occurred as audio playback technology shifted meant that if someone *really* liked an album they ended up buying it multiple times for their record player, cassette deck, and CD player. Even better business!

Then file-sharing entered the picture. As people began to consume music in digital rather than physical formats and illegally download music for *free*, the sale of physical recordings began its slow nose-dive. Look at Figure 11.1 again—you can see how the blue area gradually contracts after 1999. There was a brief new market for digital downloads: this is the smaller orange area that waxes and wanes after the launch of the iTunes Music Store. At around $1 per song, this was a smaller and less lucrative market than the one where millions of Americans were buying $15 CDs. Eventually music *streaming,* depicted in red, takes over and replaces both physical and digital purchases. Interestingly, outside of streaming, there is a current resurgence of vinyl record sales, though this accounts for a relatively small share of revenue. Now fans are predominantly getting their music from streaming services such as Spotify, YouTube, Apple Music, and Amazon Music, and money is coming in from monthly subscriptions and ad revenue. **Streaming accounted for *84 percent* of total earnings from recorded music in 2024, and 82 percent in 2025.** The next chapter will turn to the specifics of this streaming economy. The final portion of the chart— the sliver at the lower right in gray—is the small but growing income from "sync licenses." These are the payments for synchronizing music with video content, paid out when music is used in things like movies, television shows, video games, commercials, YouTube videos, or even a Peloton class. These licenses are also discussed later on.

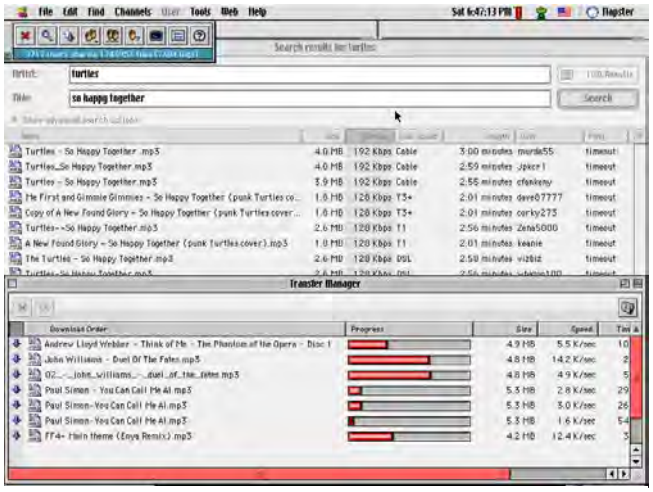
What toppled the recording industry's earlier business model? Many things. There was Napster, which we are getting to shortly. But to begin with there was an innovation that was necessary for Napster to work: the invention of a format for digital music files that was small enough to send over the internet. The audio files on CDs were massive; if you "ripped" one of them it would be too big for the limited storage devices of the time and too big to transmit over the nascent—and slow—internet. In the early 1990s, after years of research, a team of German engineers at the Fraunhofer Institute for Integrated Circuits offered a solution: **the MP3 format**, which compressed audio into files of a manageable size. This was a groundbreaking development. Suddenly music was no longer tethered to a physical medium—it had become digital, replicable, transferable. People could save songs from CDs onto their hard drives and share them with friends. Swapping MP3 files started to catch on, especially among college students. As author Stephen Witt describes in his book *How Music Got Free*, looking back on his college days in 1997: "In dorm rooms everywhere incoming college freshmen found their hard drives filled to capacity with pirated mp3s."

Then Napster arrived. From the Fraunhofer German research institute we go to the next laboratory for technological change: a dorm room at Northeastern University in 1999. An 18-year-old freshman named Shawn Fanning was working long hours on a new software program called Napster. (Napster was his online handle, after a high school nickname that was given to him because of his tightly curled hair.) Shawn Fanning joined forces with another young entrepreneur named

Sean Parker. Fanning and Parker released Napster to the public in June 1999. Once again college campuses were a locus of disruption. Author Steve Knopper recounts how "most Napster users were college students. Indiana University tried to ban the software on campus because it sucked up so much bandwidth, but a feisty computer science sophomore, Chad Paulson, chastised the administration on free-speech grounds. IU backed down." But Napster became popular well beyond colleges. It allowed the unauthorized sharing of music files to expand to the population at large.

At its height, Napster had an estimated 70 million users. The Guinness Book of World Records ranked it the "fastest growing business of all time." It was such a big deal that presidential candidates were even asked about it during the 2000 Bush v. Gore election. The question was "In light of the recent *Napster* case, what are your views on Internet file-sharing and the protection of intellectual property online? Where would your administration draw the line regarding freedom to access content versus copyright infringement?" Al Gore compared Napster to radio, which was also perceived as a threat to creators, and suggested a compromise that would allow "Napster-type technologies to flourish" but "not take away the artist's intellectual property." George W. Bush agreed with the goal of allowing creators to profit while also allowing new technologies to deliver media to consumers. As you will see, this balancing act—maintaining copyright protection without impeding technological progress—was central as copyright adjusted to the internet era.

Napster's software provided a convenient and centralized way to find and download free music. When users were logged into Napster's system, the MP3 files stored on their own hard drives would automatically be made available for copying by other Napster users. And *vice versa*. It was as if you could share the contents of your music collection with the entire world and have the world share its collection with you. Photo 11.2 shows a screenshot of the Napster interface. If I was looking for the song "So Happy Together" by The Turtles, I would type that information into Napster's search fields, and the result would show me corresponding file names from other Napster users. When I selected one of those results, the software would connect my computer with the host computer where the file was stored so that I could download it. It is important to understand that Napster did not store the MP3 files on its own servers; the music files resided on the users' computers and were shared "peer-to-peer" or "P2P." Napster only maintained a search index showing the *names* of the files available from its users' computers.



Screenshot of Napster interface (Photo 11.2)
Source: Njahnke/Wikimedia.

Napster provided the connection, the directory, the interface. It did not directly supply the music. The file names themselves were designated by the users and often had typos or creative misspellings.

Imagine the excitement for music fans—no longer did you have to buy a $15 CD to listen to that song by your favorite band. You and anyone else in the world could just download the MP3 from another Napster user, for free! You could discover new artists that you liked. You could preview music you didn't like before having to buy it. You could amass a library of thousands of songs without breaking the bank. No wonder Napster was popular. Now imagine the sinking feeling if you were part of the music industry. Napster was an existential threat to its business model. It was time to shut this thing *down*. The music companies sued Napster for copyright infringement.

We will get to that lawsuit shortly. But first, let's take stock of what just happened.

A Technological Transformation: Digital Content + the Internet

Remember from Chapter Two how a song, unlike a bottle of beer, is "non-rival" and "non-excludable." That was why we needed copyright law—to give owners *exclusive* rights that they could use to get paid. Otherwise their art could be freely copied and shared. As a practical matter, however, you could not easily replicate someone's music and share it with the world. You would need a CD pressing plant and a fleet of trucks. Sure, you could record a song on a cassette tape and hand it to your friend, but that took time and effort—"transaction costs," in the terminology economists use. Sharing had inbuilt constraints of technology and effort, and copyright's rules had been written against the backdrop of those assumed constraints.

Music used to come packaged in tangible embodiments—in "bottles" if you will—in all of those physical formats represented in Figure 11.1. That's what the industry was selling. Then everything changed. **Music had escaped its physical embodiments—it was flowing freely in patterns of ones and zeros and available online at the click of a button.** How could copyright deal with *that*? How could the music business compete with *free*?

These questions were raised decades ago by prognosticators from the music world. In 1992 John Perry Barlow wrote an article about digital media and intellectual property called "Selling Wine Without Bottles." Digital content was the "wine" that was now free of the "bottles" that used to encase it (this book used bottles of beer for an analogy; Barlow went with wine). Barlow was both a music maker and technologist—he was a lyricist for the band The Grateful Dead and a co-founder of the Electronic Frontier Foundation, a nonprofit dedicated to protecting civil liberties on the internet. To the right you can see his depiction of how the law would react to this technological transformation.

> Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial.
>
> -John Perry Barlow

In the article he asked: "if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with

our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?" Traditional copyright law would be unable to keep up because it was a "sinking ship…developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry."

Ten years later, in 2002, the great musician David Bowie—featured in the art at the end of the final chapter—made a similar prediction to the *New York Times*: "The absolute transformation of everything that we ever thought about music will take place within 10 years, and nothing is going to be able to stop it…I'm fully confident that copyright, for instance, will no longer exist in 10 years." By then Napster had been shut down, but the genie was out of the bottle and music revenues had begun their free fall. Like Barlow, Bowie described digital music as something fluid and free, famously saying that **"Music itself is going to become like running water or electricity."** To make a living, musicians would have to return to something that was truly *excludable*—performing at a physical venue where you still had to buy a ticket to get in. As Bowie put it: **"You'd better be prepared for doing a lot of touring because that's really the only unique situation."**

Well, here we are. This book is being published more than 30 years after Barlow's prediction and over 20 years after Bowie's. Barlow and Bowie were prescient. For a limited period of time, some recorded music became practically, if not legally, "free." There was an "absolute transformation." Bowie was also right about the effect of that shift on the ways that musicians make money. Live performance is as important as ever for artists, perhaps more important. For many, it is their main source of revenue. What about the law? Deck chairs were rearranged, stern warnings were issued, and there was a period of "serene, glassy-eyed denial." But the Titanic did not sink. Copyright law is still here.

How do you compete with free? You offer a better product, or at least a more *convenient* one. That's what streaming services have done. That's what bottled water does—why people pay for that portable, brightly-labeled bottle of mediocre water when they could get water just as pure out of the tap. With music, we have managed to get the water, or wine, back into the bottle.

What follows in this chapter and the next is the story about what actually happened after "music got free"—the legal and economic journey, the effects on artists and consumers, the *creative destruction* that culminated in the streaming era you are currently in, represented by the growing red space on the chart. The recording industry found a solution. But it only did so after stalling out for a decade, during which music companies frantically filed lawsuits against upstarts and even their own customers, and allowed *technology companies* such as Apple and Spotify to build the new infrastructure for music delivery.

So far, we have focused on how technology disrupted a particular business model and imperiled copyright's promise of excludability. The recording industry is an important part of the music ecosystem and file sharing was an enormous threat to it. We will resume that story shortly. But the internet was not universally perceived as a threat. Outside of the creative industries, there was a world of creativity—musical and otherwise—where it presented an *opportunity* to share works on a scale never before possible.

The copyright problems there were different. Among them was the fact that copyright law was not written to enable this kind of sharing. Its default rule is "all rights reserved." If you encounter a work online, copyright's assumption is that the owner reserves all of the exclusive rights. That leaves you unsure about what you can *do* with that work until you track them down and get the necessary permissions, unless your use falls within an exception such as fair use. (In reality, people may be unaware of the law or ignore it, and owners may tolerate unauthorized uses.) Some owners very much want "all rights reserved." But others prefer "some rights reserved" or "no rights reserved." Maybe they want people to use their work so long as it is for noncommercial purposes. Or perhaps they want people to use it for any purpose, so long as they get credited as the author. Maybe they want to plant the seed for further creativity, hoping that people will find their music and do something cool with it. What was missing was a simple and easy way for creators who wanted to share, under generous terms, to let users know they were doing so.

As discussed in the previous chapter, sometimes solutions occur outside of copyright law. Enter the Creative Commons (CC) licenses already mentioned. These licenses let creators designate the copyright terms that attach to their works online—granting permission ahead of time to copy, distribute, display, perform, and sometimes modify and build upon them, under certain conditions. The options for CC licenses were listed in Chapter Ten when we looked at how sampling artists could use CC-licensed recordings. Through private choice, these licenses enable a *sharing economy*. Authors attach a set of freedoms to their works, and we can all use those works within the terms of the license. Today there are *billions* of works under CC licenses. (Estimates range from 2.5 billion up to tens of billions. The distributed nature of the internet makes it hard to get an exact number.) All of the text on Wikipedia is under a Creative Commons license. So are millions of media files in Wikimedia Commons. So are college courses, "open access" scientific articles, and a trove of other creative works—photographs and illustrations and books and music that creators *want* to make available for anyone to reuse.

Interestingly, sharing is not necessarily inconsistent with financial reward. While free availability can displace sales, this is not always the case. Sometimes it functions as free publicity—turning many more people onto an artist's work than would have found it otherwise—or makes existing fans want to reward the artist. The band Nine Inch Nails released its 2008 album *Ghosts I-IV* under a Creative Commons license, allowing fans to remix and share the music noncommercially. (You may remember the story about the Nine Inch Nails sample in Lil Nas X's "Old Town Road" from the previous chapter—the Creative Commons license did not cover that sample because the license only allowed noncommercial uses.) Even though *Ghosts I-IV* was freely available under a CC license for anyone to download, people still purchased downloads and vinyl versions of the album. It brought in over $1.6 million in its first week and was the *number one* best-selling MP3 album on Amazon's MP3 store in 2008.

11.2 SECONDARY LIABILITY FOR INFRINGEMENT

Back to conventional copyright, Napster, and the lawsuit filed against it. As promised, it is time for copyright law, the internet edition. You might be thinking "duh, of course Napster was breaking the law." After all, most of the music being shared on Napster was copyrighted. *Copying it without permission was copyright infringement.* Easy case, right? One minor issue: it was Napster's *users*, rather than Napster itself, who were doing the copying. Napster just provided the software that connected them to one another, along with the directory of file names. But it would be impractical for the record companies to sue millions of Napster users. They had to go to the source. How could they make Napster liable for the actions of its users? The answer depends on something called **secondary liability**. If I am illegally downloading music, I am engaging in "direct infringement." If you provide the technology that enables my infringement, you might be on the hook for "secondary liability," depending on the nature of your actions and the technology.

Generally, in the law, secondary liability is imposed on someone who does not commit a legal wrong directly, but is found responsible for encouraging, facilitating, or profiting from it. How does secondary liability function within copyright law? The answer turns out to be tricky. There are no rules creating secondary liability anywhere in the Copyright Act—the federal statute that lays out the rules for copyright law. That is where we found the exclusive rights you read about in Chapter Two and Four and the fair use factors you read about in Chapter Five. Instead, secondary liability is "judge-made law"—law developed by judges "reading between the lines" of the statutory provisions, or importing concepts from analogous areas, such as patent law, or the general "common law" rules developed by courts in other areas. This has allowed the law to morph over time as judges attempt to recalibrate it to reflect new technological circumstances. As you will see later in this chapter, in 2026, the Supreme Court rewrote the framework for secondary liability in a case called *Cox v. Sony*. What follows is a legal journey to that destination.

The basic judicial framework was laid down in a bygone era, back in 1984. The disruptive technology at the time was the video tape recorder, also known as a "VTR" or more commonly as a "VCR" (for "videocassette recorder"). VCRs let people record over-the-air television broadcasts, including movies and TV shows, without permission. The head of the motion picture trade association described the threat from this device in dire terms: "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." Duly terrified, copyright holders sued the electronics manufacturer Sony for its "Betamax" VTR.

The technology at issue in the *Sony* case (Photo 11.3)

Sony was not itself recording television broadcasts; it had merely created the box (shown in Photo 11.3) that enabled its consumers to do so. If Sony was breaking the law, it had to be because of *secondary* liability—that somehow it was illegal for Sony to develop a technology that let *users* break the law. The

case went all the way to the US Supreme Court. In a landmark decision, the Court refused to stretch copyright law to the point where it would make a new technology such as the VCR illegal. The VCR was a "dual-use" technology—people could do both illegal *and* legal things with it. The Court did not want to "declare VTR's contraband" and ban an innovation with the potential for "legitimate, unobjectionable" uses. Therefore, the Court came up with a rule that is now referred to as "the *Sony* safe harbor": there is no secondary liability when a product is "**capable of substantial noninfringing uses**."

Sony won because the VCR was capable of two key kinds of noninfringing use. The first was recording shows with copyright holders' consent—it turned out that the owners of some sports, religious, and educational programming, including Mr. Rogers from the children's show "Mister Rogers' Neighborhood," did not mind when people recorded their shows. Some PBS TV channels also testified that they were happy to have their shows copied. Copying all of that content was therefore legal. The second noninfringing use was called "time-shifting"—recording television broadcasts so you could watch them later. This was before on-demand programming, so if viewers were busy when a show aired they would miss it if they could not record it. The Court said that time-shifting was legal because it was a private and noncommercial activity that qualified as a *fair use*. Either of these legitimate uses was enough to make the VCR "capable of substantial noninfringing uses."

Even though some people were using their VCRs to infringe copyright—for example by building "libraries" of unauthorized recordings of movies and shows—the Court did not hold Sony liable for selling the VCR itself because doing so would squelch the ability of people to use it for legal uses, both currently and in the future. Ironically, those future uses actually *benefited* the copyright holders who originally viewed the VCR as a threat. As VCRs became cheaper and more ubiquitous, the market for renting tapes to play in them grew, to the point where videocassette rentals accounted for over 50 percent of movie industry profits. What seemed like a threat turned out to be an opportunity. Remember the Blockbuster video rental stores mentioned earlier? One technology cycle brought us the VCR and video rentals, then another cycle sent those the way of the dodo and gave us Netflix. It is Schumpeter's "perennial gale" in action.

Back to the *Napster* case, where in 2001 the Ninth Circuit Court of Appeals had to apply the *Sony* framework to technology the recording industry feared even more than the movie industry had feared the Betamax: peer-to-peer filesharing. There, in addition to looking at possible *legal* uses of Napster's system, the court focused on the staggering amount of *illegal* activity that Napster enabled. In doing so it delineated two different strands of secondary liability. (The *Sony* case had referred in passing to both of these but did not clearly distinguish between them.) Contributory infringement occurred if someone "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." This definition has since been supplanted by the 2026 Supreme Court decision covered later in this chapter. Vicarious liability applied when someone "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."

Napster lost. It was guilty of "contributory infringement" because it had specific knowledge about the illegal downloading that was happening and materially contributed to it by providing the necessary "site and facilities." It gained that knowledge through its search index, which was full of copyrighted songs such as "So Happy Together" from the image earlier. There was also other evidence showing that Napster was aware of its users' infringement, including a document mentioning "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music'" and the fact that the recording industry had told Napster about more than 12,000 infringing files, many of which were still available on its system. The record company's lawyers even pointed out that the person at Napster responsible for complying with the Digital Millennium Copyright Act had thousands of illegally downloaded songs on his computer.

Napster was also guilty of "vicarious liability" because it had the right and ability to block infringers' access to its system and had a financial interest in their actions. This financial interest was attenuated, since the Napster software was given away for free, but the court said that it was enough that the availability of infringing content "acts as a 'draw' for customers" and that Napster's future revenue was dependent upon such "increases in userbase."

What about the *Sony* safe harbor? Napster appeared to be "capable of substantial noninfringing uses." *Sony* had suggested that even a handful of authorized uses—such as recording shows like "Mister Rogers' Neighborhood"—was enough to satisfy that standard, and the word "capable" indicated that quantifying "substantial" was a forward-looking exercise. Even if there were a limited number of legal uses *now*, the safe harbor provided breathing space for technologies to develop because they might enable more of those uses in the future—just as VCRs did with videocassette rentals. Some people were already using Napster for legal purposes: they were downloading public domain music as well as music whose owners wanted their songs to be shared, just as Mr. Rogers approved of people recording his show. And Napster was certainly capable of more legal uses down the line. Did this mean Napster was legal?

The fact was that Napster was very different from the VCR. The sheer magnitude of current and future infringement—the way that Napster allowed for the instant, global distribution of free music—put it in a different league. The Napster court had to find a way to preserve the *Sony* safe harbor while at the same time ensuring that it did not shield Napster from liability. It chose to do so by interpreting the *Sony* ruling narrowly.

Unlike Napster, Sony did not have actual knowledge of infringing activity—it just sold a machine and did not know what purchasers did with those machines after they bought them. If there was any kind of knowledge for purposes of contributory infringement, it was from "constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material." Nor did Sony have the right and ability to supervise VCR users that would lead to vicarious liability. Therefore, the *Napster* court decided that *Sony*'s safe harbor was more limited than many had assumed. True, it shielded technology producers from contributory infringement liability even if they had

"constructive" knowledge of infringement. However, the court said that Napster went beyond *constructive* knowledge—"we have developed a technology that we acknowledge could be and probably will be used to violate copyright law"—to having *actual* knowledge of *specific* infringement. The court held that the *Sony* safe harbor did not apply if there was actual knowledge, and also did not apply if there was vicarious liability. If Napster merely had constructive knowledge of infringement and materially contributed to it, they might have been saved by the *Sony* safe harbor. But because Napster knew about specific acts of infringement and was vicariously liable, *Sony* was of no assistance.

It is important to note that the *Napster* court was offering its own particular interpretation of *Sony*. *Sony* itself never said its safe harbor was limited to one subset of secondary liability, and contained language suggesting that the safe harbor should apply across the board. Not all commentators agree with *Napster*'s reading of *Sony*, but it did provide a roadmap for holding file-sharing services liable. It also provided a roadmap to future file-sharing services for how to evade liability.

As a result of this case, the version of Napster you've read about above was shuttered in July 2001 after its meteoric two-year run. The Napster name and logo were later purchased by other entities who used them for different, legal, services. This seemed like a huge victory for the recording industry, right? Not entirely. As it turned out, when one file-sharing service was shut down, another one would spring up to take its place. Napster was just the first chapter in a longer game of whack-a-mole. File-sharing options proliferated—Grokster, Morpheus, LimeWire, Kazaa, BitTorrent, and many more. And some of them were specifically designed to get around copyright liability.

This was what happened with Grokster and Morpheus. Unlike Napster, the architecture of Grokster and Morpheus was decentralized. There was no "search index"; the producers just provided users with a piece of software. This meant that they did not gain actual knowledge of infringing activity and did not have the right and ability to supervise users' actions. Sounds more like Sony, doesn't it? Grokster and Morpheus were sued and they *won* in the Ninth Circuit Court of Appeals. The lawsuit then went to the US Supreme Court. As in the *Napster* case, the scale of the infringement was staggering. This time it was the Supreme Court that had to figure out how to preserve *Sony* but still hold Grokster and Morpheus liable. In 2005 it came up with a solution: it delineated a form of secondary liability called "inducement." Inducement liability applied to "one who distributes a device [such as file-sharing software] with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement."

Inducement fit well with the types of things Grokster and Morpheus were doing. They had deliberately tried to attract former Napster users who were looking for a new way to illegally download music. As more and more file sharers used their software, they benefited from selling ad space. They were bad actors, and this was the kind of "purposeful, culpable expression and conduct" that the law should prohibit. The Court made clear that the *Sony* safe harbor does not protect such actors from inducement liability.

Some of the old, technology-protecting framework was still alive, but it had been modified. If your product is "capable of substantial noninfringing uses," the Sony safe harbor will protect you from contributory infringement liability so long as you have no actual knowledge of specific infringing activity in the way the creators of Napster did. It will not shield you from vicarious liability or if you are guilty of inducement. That safe harbor is now narrower and other new or expanded forms of secondary liability have limited its protection.

So was Grokster finally a victory for the recording industry? Again, not exactly. As author Steve Knopper recounts in the book *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age*, the problem for the industry during this period was that they were generating lawsuits rather than new business ideas. The recording industry did not just sue file-sharing services. It also brought direct infringement lawsuits against its own customers, suing tens of thousands of "college students, insurance-company clerks, karaoke DJs, engineers, restaurant owners, flight attendants, and people of all ages, genders, and musical tastes." College students and their parents received strongly worded letters demanding hundreds of thousands of dollars for illegally downloaded music, at the rate of $750 per song. If they were willing to make a deal, the recording industry would often settle for a much lower amount. In retrospect, suing customers was not a great PR move. But at the time the president of the recording industry trade association explained that "you have to choose between your wish to be loved and your wish to survive." He wanted to "get the message out" that file-sharing was illegal and had consequences.

The strategy did not work. People kept downloading music, sales numbers continued to tank, and the door was open for companies like Apple to set up its iTunes store in 2003. It may be hard for you to imagine, but it was not until 2003, over a decade after the development of the World Wide Web, that there was a legal online source with a full catalog of digital music! Until then, it was easy to steal music but hard to buy digital music online. The recording industry was losing ground and missing opportunities. For instance, there were efforts to broker a deal between Napster and music companies—such a deal would have connected the music companies to Napster's enormous consumer base along with all of their data and their enthusiasm for music. Back then, however, the music and tech communities were living in two different worlds. And there is an innate cognitive bias that makes it easier to perceive existing threats than inchoate opportunities. Hilary Rosen, former chairwoman of the industry trade association, recalled that "they just did not see a business model that was anything but cannibalizing in the worst sense. They needed to jump off a cliff, and they just couldn't."

In the book *Tarzan Economics*, Will Page, the former Chief Economist at Spotify, offers guidance from the music industry's experience for others who need to "pivot through disruption." He begins by saying "we all have a Napster moment ahead: can you see yours?" In explaining "Tarzan economics," Page quotes from technologist Jim Griffin, who said: "We cling to this vine that keeps us off the jungle floor. Yet, at the same time, we swing for the next vine, because we want to be propelled forward. The trick is figuring out when—when to let go of that old vine and when to embrace that new vine." The recording industry spent

years clinging to the withering vine of the CD-selling days and now it is finally in a new upward swing from the streaming economy. Adapting to a new business model is hard, but "knowing when to move" is necessary to survive the inevitable cycles of creative destruction. Easier said than done, of course.

A legal transformation: copyright becomes technology regulation

This chapter has explored the technology that gave us the ability to easily copy, modify, and share copyrighted material. In this world, copyright's domain has transformed in at least two ways. First, as discussed at the end of Chapter Two, there is copyright's practical reach. In the past, it would have been difficult to violate copyright, particularly at scale. Copyright law rarely directly regulated activities that people normally engage in—people who didn't have recording studios or printing presses or broadcast towers. Today copying is implicated in routine acts of communication and consumption. Now your phone is a movie studio, a recording studio, a printing press, a broadcast tower. Your activities trigger copyright law all the time. Think about all of the third-party music, images, video, and text you have shared in the past month.

How do we deal with all of the potentially infringing material online? Should we nip sharing in the bud, and go after the products or services that enable that infringement? The answer brings us to the second transformation: copyright has become a tool for technology regulation. Because it is more efficient to address infringement on the technology level than to try and manage the behavior of millions of people, we are increasingly making decisions about technology and communications policy inside of copyright law.

Earlier in this book, the infringement cases you read about dealt with content regulation. Courts were deciding whether "Blurred Lines" took too much from "Got to Give It Up," whether N.W.A could sample two seconds from "Get Off Your Ass and Jam," whether Drake legally copied Jimmy Smith's words in order to critique their perceived jazz elitism. The challenge was to find a balance between the control of one's creations and freedom to create in the first place.

With technology regulation, we find a different balancing act—between meaningful copyright protection and technological development. In *Sony*, the Supreme Court sought to "strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." In *Grokster*, the Court remained "mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential" and said: "The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off." The Court noted that it is not a zero-sum game, though—technology producers also have copyright interests in their own software and other creative outputs, and copyright holders have an interest in new technologies that will lower their production costs and expand their audience.

Still, rights holders and technologists often find themselves at loggerheads. On the one hand, copyright owners want legal tools to restrain the actions of swarms of anonymous infringers. They need meaningful protection; otherwise enforcing their rights would be like

trying to empty the ocean with a spoon. By shutting down the technology, or bringing it under their control, they can strike at the root of infringement. On the other hand, technology developers want to innovate without constantly worrying about being sued when people use their products to violate copyright laws. How can they justify putting their time and money into developing something that will just get snarled in a lawsuit? If you were an investor, or a company executive, would you green-light the next iPod, Dropbox, or YouTube? All of them could be, and were, used to violate copyright.

Threading this needle is not an easy task and the law is constantly adjusting in its attempts to do so. *Sony*'s safe harbor provided one tool for dealing with dual-use technologies—if they are capable of substantial noninfringing uses, you can produce them so long as you do not know about the specific infringing activity, induce it, or fall within vicarious liability. Look around you—at your computer, your phone, your thumb drive—like the VCR, all of these are legal even though you *could* use them to infringe copyright. But *Sony* only went so far. The development of the web threatened to make services you take for granted—search engines, social media, even internet service providers—illegal because all of them depend on making copies. Not merely indirectly but directly. Copyright is a strict liability system; intent is not required. Google copies the entire web many times a day. The web has a lot of material that violates copyright on it. Could it be that Google was illegal? Copyright's second technology-protecting safe harbor came, not from the *Sony* case, but from a 1998 law called the Digital Millennium Copyright Act. We will cover that law in more detail in section 11.3.

Copyright's standards for regulating technology continue to evolve. In 2026, the Supreme Court returned to the question of copyright secondary liability. It had decided the landmark *Sony* case you read about earlier in this chapter in 1984. *Grokster* came down twenty-one years later, in 2005. Then, another twenty-one years later, the Court significantly reinterpreted both *Sony* and *Grokster* in *Cox Communications, Inc. v. Sony Music Entertainment* (2026). (In *Sony v. Universal*, Sony had been the technology provider; now Sony Music Entertainment was the copyright owner suing Cox Communications for the infringing activity of Cox's customers.)

Before the case reached the Supreme Court, Sony had won a billion-dollar verdict against Cox, which was deemed guilty of contributory infringement for continuing to provide internet service to its subscribers after being notified that those subscribers had illegally downloaded music. The Supreme Court reversed and ruled in favor of Cox.

The Court said that there are two categories of secondary liability for copyright infringement: "vicarious" and "contributory" liability. It folded "inducement" liability into the latter category. The Supreme Court's legal rulings apply across the country, as you learned in Chapter Four. Therefore, in the wake of *Cox,* here is the framework for secondary liability in the United States.

There is **contributory liability** for a user's infringement when a party "***intended* its service to be used for infringement**," either by

1) **affirmatively *inducing* the infringement**, as in *Grokster*, or

2) **selling a service *tailored to* infringement**, defined as a service that is "not capable of 'substantial' or 'commercially significant' noninfringing uses."

There is **vicarious liability** when a party has:

1) a **right and ability to supervise** the direct infringement, and

2) **profits directly** from the infringement.

While the *result* in *Cox v. Sony* was not entirely unexpected, the Court's formulation of secondary liability took copyright experts by surprise. *Grokster* seemed to indicate that inducement was a *third* category of liability; now it is a subset of contributory liability. The "tailored to infringement" language is entirely new—it appears nowhere in *Sony v. Universal* or in *Grokster*. It is defined as anything outside of the original *Sony* safe harbor, essentially collapsing a ground for liability into a limitation on that liability. It is akin to saying "you're only on the hook if you're not off the hook."

More fundamentally, the 1984 *Sony* case had explicitly focused on *knowledge*, and decades of appellate decisions—including *Napster*—had likewise understood the standard for contributory liability to turn on knowledge, not merely intent. After *Cox,* a party who "with knowledge of the infringing activity…materially contributes to the infringing conduct of another" may no longer be a contributory infringer so long as they did not induce the infringement or sell a service tailored to infringement. (Napster itself likely would still lose under *Cox*'s new definition due to culpable intent, but other services that would have been illegal before may now be legal.) Copyright's secondary liability rules—so important to the balancing act between meaningful copyright protection and technological development—have been rewritten yet again, this time in favor of technology providers.

Cox's reinterpretation of the law also appears to be in tension with the premises underlying the DMCA safe harbor that we are about to cover. That law shields online service providers from both direct and secondary liability, but only if they take certain steps to curb infringement by their users. It was passed in 1998, when there was a different understanding of the circumstances giving rise to secondary liability than what was offered in *Cox*. Going forward, there may be fewer incentives for some services providers to comply with the safe harbor's requirements because they would no longer be liable in the first place.

11.3 THE DIGITAL MILLENNIUM COPYRIGHT ACT

The internet raised the stakes of copyright's balancing act with technology regulation. This is because, as described by Kevin Kelly, the founding executive editor of *Wired* magazine: "The internet is a copy machine. At its most foundational level, it copies every action, every character, every thought we make while we ride upon it." Some of these copies are perceptible; others are transitory and evanescent. AT&T, Comcast, and other companies that provide internet access have infringing material constantly flowing over their

connections. Networks of all kinds temporarily "cache" material to speed up transmission. Gmail has billions of emails with possibly infringing content passing through its systems and sitting on its servers. In 2020, over 500 hours of video were posted to YouTube every *minute*, the equivalent of over 30,000 hours of newly uploaded video every hour. TikTok videos are often shorter, but it is estimated that there are nearly 300,000 hours being uploaded every day. Even if only a small portion of those videos contains problematic material, the scale of infringement would still be enormous. Facebook, Instagram, and Twitter (now Meta and X) users regularly post images and videos without permission. Dropbox folders are full of both legal and illegal content. Google's "crawlers" index the web by copying it—according to Google, its index "contains hundreds of billions of webpages and is well over 100,000,000 gigabytes in size." A back of the envelope calculation indicates that this number is probably a dramatic understatement.

Because of the way technology works, these intermediaries and platforms are continually making copies of infringing material in the course of storing and delivering content. In some cases they are also publicly performing or displaying it. These activities implicate the exclusive rights of copyright owners that you learned about in Chapter Two. Could those platforms all be sued not only for secondary liability, but also for *direct* infringement? We have run right past the *Sony* scenario, where the company is accused only of contributing to others' infringement. Online intermediaries actually make copies themselves—they have to. Copyright is a "strict liability" system. It does not matter whether you intended to commit copyright infringement. The question is "did you copy protected expression without permission?" Were copyright to be applied formalistically to the online world, every entity "making copies"—every search engine, internet service provider, email service, or social media site—would be violating copyright millions of times every day. The internet as you know it would be illegal.

Enter the **DMCA safe harbor** in § 512 of the Copyright Act.[50] Congress enacted the DMCA in response to the concern that "[i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability." The safe harbor has the following goal: "by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand." Service providers are shielded from direct and secondary copyright liability that might arise from four categories of conduct: 1) acting as a mere data conduit, 2) system caching, 3) hosting material at the direction of users, and 4) linking to sites that contain infringing content. To qualify for this protection, service providers must meet certain conditions laid out by the law.

[50] Note that the DMCA is different from Section 230 of the Communications Decency Act, a rule that you might have read about or seen in the news. Section 230 give Internet platforms immunity from other forms of liability, for example, if users post defamatory material. It also gives them immunity for attempting to moderate and police their systems; an outraged user cannot sue them because their posting was deemed offensive and removed. However, Section 230 specifically excludes *copyright* claims. The DMCA is the law that deals with platforms and copyright and its rules are customized for that scenario.

Think about all of the entities that fall within these categories. First, it covers the company that connects you to the internet—AT&T, Comcast, or the internet service provided by your university. Cox Communications fits within this category, but it did not qualify for the DMCA safe harbor during the *Cox v. Sony* litigation because it did not have a "reasonably implemented" policy for terminating the accounts of repeat infringers; this is one of the threshold requirements for safe harbor. Second, the DMCA covers the networks that "cache" frequently requested material for quicker access. For example, your university might "cache" the front page of the *New York Times*, refreshing it every few minutes, so that it can serve it up to you faster. Third, it covers your social media sites such as Instagram or X which host vast amounts of material posted "at the direction of users"—namely, you, your friends, and the rest of the world. Finally, it covers the search engines such as Google that let you search this giant network. In other words, it is not an exaggeration to say that the DMCA has undergirded, indeed has *shaped*, the development of the internet as you know it.

Of particular interest for *music* is the safe harbor for storing material "at the direction of a user" because it covers platforms that host user-generated content such as YouTube, SoundCloud, Instagram, Mixcloud, Bandcamp, and TikTok. These platforms play a key role in the current music ecosystem. Millions of fans use them to discover, share, and engage with music. Artists use them to reach those fans and to launch or propel their careers. Justin Bieber, Shawn Mendes, and The Weeknd did this on YouTube; Lorde, Billie Eilish, Chance the Rapper, and Post Malone on SoundCloud; Megan Thee Stallion on Instagram; and Lil Nas X on TikTok. So it is important to understand how these services operate within the DMCA safe harbor, and how their legal framework is different than the one for streaming services such as Spotify and Apple Music.

The DMCA safe harbor only applies when a service is hosting content *uploaded by users*, as opposed to publishing the content itself. This insulates platforms like YouTube from liability for the activity of its billions of users. Spotify and Apple Music are different because they are streaming music themselves rather than streaming music uploaded by users. Therefore, they are not covered by the safe harbor and they have to obtain the licenses discussed later in this chapter. Some platforms have both features that are covered by the DMCA and others that are not. Regular YouTube—where users "broadcast themselves"—is protected by the safe harbor. But YouTube Music—its direct streaming service—operates under different rules. On TikTok, user-generated content is technically within the safe harbor, and TikTok is not responsible when that content violates copyright so long as the company complies with the DMCA. However TikTok has obtained licenses for the music in its audio libraries—this content would fall outside of the safe harbor because TikTok itself makes it available to users. TikTok's licensing arrangements are covered in the next chapter.

How does the DMCA safe harbor work? Services such as YouTube only get the safe harbor if they "expeditiously" remove infringing material upon learning about it. If a copyright owner sends a "notification of claimed infringement"—commonly referred to as a takedown notice—to a service provider, the provider must remove the upload containing the

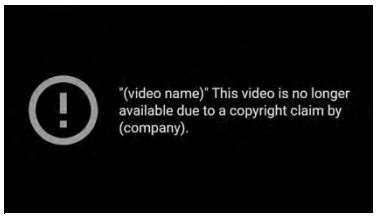
allegedly infringing material.[51] They also have to maintain a policy that will terminate the accounts of users who repeatedly infringe copyright. This gives rights holders a mechanism for removing unauthorized content from online platforms and adds penalties for repeat offenders. What happens if an upload did not actually infringe copyright and was mistakenly removed? The DMCA contains two safeguards that are meant to address this situation. First, if a user sends a "counter notification" to the service provider, the content is supposed to be restored within 10–14 business days, so long as the copyright holder does not file a court action. The user can also bring a lawsuit if a copyright holder "knowingly materially misrepresents" that content is infringing when it is not. These various processes do not always work as intended, however.

When it is working well, the way we handle user-generated content online can benefit rights holders with new revenue, insulate platforms from undue liability, and allow user-generated creativity to thrive. It can launch the career of the next Justin Bieber, who no longer needs to rely on radio or MTV for exposure. Fans can spend hours watching videos of cats riding Roombas, with cool soundtracks. But when things go wrong, rights holders and artists lose meaningful control over their content online. Service providers get caught up in lawsuits. Uploaders find their creations wrongfully taken down. Fans looking for cat videos get a blank screen instead.

How do things play out in practice? You have probably encountered all sorts of music on YouTube. Sometimes copyright owners are posting audio and video content they have created themselves or over which they hold the copyright—in that case there is no copyright issue. But other times it is a user who is posting someone else's copyrighted song, perhaps showing the album cover or lyrics while it is playing. Or perhaps the YouTuber includes third-party music as part of a funny video or a remix. If the copyright holder wants these videos taken down, they can send a DMCA notice and the video will get pulled. This often happens even when the video *should* be protected by fair use—for example if the video plays part of a copyrighted song in order to critique its lyrics.

These days, online services have taken things a step further than the DMCA's "notice and takedown" process and set up **automated content management systems**. These systems go beyond the requirements of the DMCA, effectively replacing legal "code" with a parallel system of computer "code." (To use Professor Lawrence Lessig's terminology, "East-Coast code" has been replaced with "West-Coast code.") Almost all of the takedowns on YouTube are now handled by its **"Content ID" system**. In 2020, there were more than 9,000 copyright holders using Content ID, with claims covering 800 million videos. Here is how it works. To use Content ID, copyright holders submit reference files of their material to YouTube, which makes digital "fingerprints" of them that are stored in a huge database. When a video or livestream is posted to YouTube, it is scanned against these fingerprints, and if there is a

[51] To learn more about how a service complies with the DMCA, do a Google search for their "copyright policy." To comply with the requirements for the safe harbor, the policy should explain how user content will be removed if it infringes someone else's copyright and how repeated copyright violations will result in account suspension or termination. If you want to learn even more, look at their "terms of service" to see the legally binding provisions that users must agree to before posting content.



YouTube's notice when a video has been removed (Photo 11.4)

"match" of video or audio the copyright holder has three options. They can have the video **blocked**, in which case it is replaced by a notice like the one you see in Photo 11.4; **monetized** so that they get revenue from ads; or **tracked** so that they get detailed viewership analytics. Many music copyright holders choose the monetization option. This means that the user's video stays up and the copyright owner gets ad revenue from it—the default revenue split gives the copyright holder (not the uploader) 55 percent with YouTube getting the other 45 percent.

On the plus side, Content ID offers an efficient way to manage large volumes of content, and a lot of content stays up and generates income for copyright holders (though not for the video uploader). On the minus side, YouTube's dominance means that Content ID, rather than the law, ends up dictating what stays online. Unfortunately the system is both imperfect and opaque. Sometimes it is underinclusive and misses infringing material. Often it is overinclusive—it regularly tags fair uses of copyrighted content and attaches copyright claims to videos that are entirely legal. In an ironic example, an academic discussion at New York University's (NYU) law school about *music copyright*, including the "Blurred Lines" case, was flagged by Content ID because the panelists played illustrative clips from the songs involved in copyright disputes. This was a clear instance of fair use but the video was tagged anyway. Content ID also makes erroneous matches, tagging as asserted copyright infringement things such as bird songs and white noise, or an orchestra's own performance of public domain classical music. Beyond these kinds of mistakes, automated systems are also being misused by people who want to censor content for reasons totally unrelated to copyright law. In 2021 there were numerous reports of cops who deliberately played copyrighted music during police encounters in order to keep videos of those incidents off social media. One cop who weaponized Taylor Swift's "Blank Space" in this way openly said to an activist: "I'm playing my music so that you can't post on YouTube." Unfortunately, we do not know whether he picked that track because of the irony of its name.

The problem with automated filtering systems is that there is no "judge on a chip" to distinguish between infringing and noninfringing uses. In theory, users can dispute erroneous Content ID claims, but the procedure is confusing and many are dissuaded from doing so because under YouTube's rules it risks triggering a formal DMCA notice, which results in a "copyright strike" if the dispute is unsuccessful. If a YouTuber gets three of these strikes in 90 days, their entire account is subject to termination and all of their videos disappear. Even the NYU law professors were unwilling to take that chance, since "one misstep could wipe NYU Law's entire YouTube presence off the internet."[52]

[52] Their video had multiple Content ID claims attached to different song excerpts, and it was unclear whether they would be subject to one copyright strike because the claims were all for a single video or multiple strikes because there were multiple claims. The professors asked YouTube for clarification but never received an answer.

Some have claimed that YouTube is operating Content ID in a way that not merely discourages fair use, but also makes the dispute process almost impossible to navigate for independent creators, who yield to incorrect challenges out of the fear of losing access to one of the few dominant internet platforms. For example, the Electronic Frontier Foundation, a digital civil liberties group, recently produced a White Paper called *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*. The stories it recounts are troubling: creators are having to let others appropriate the revenue they would have received from their own copyrighted creations, as a result of spurious copyright claims. Why do they not challenge those claims? Because of the fear that they will be automatically kicked off of a system that does not really recognize fair use and whose judgments end up being final and unreviewable. The point is that a judge-on-a-chip is not an actual judge. Indeed, Content ID operates at such a scale that human judgment is practically impossible: the report estimates that the system made automated judgments of 122,500,000 copyright claims in 2017.

To sum up, automated content filtering systems certainly offer advantages. They help protect (some) copyright owners and, given the sheer *scale* of material being created and uploaded daily, they are probably the only practicable way to monitor and manage all of this content. But, as currently implemented, they also have considerable downsides. Content ID in particular has not yet cracked the code of dealing sensitively with fair use, and it seems in operation to be particularly hard to navigate for independent creators. Automated content filtering systems would present fewer concerns if they had a better mechanism for disputing and fixing erroneous claims. In addition, these systems—ironically—help entrench the dominance of established major platforms and act as a barrier to new entrants to the market. Content ID cost millions to develop and operate. If every new service now has to have its equivalent in order to operate, how many upstart companies—companies like YouTube once was—will be able to enter the market to compete with it?

The story of Content ID tells us a lot about how systems develop and change in the shadow of the law. But the law can evolve as well, and incumbents on different sides of the issues have very different views about how it should do so. That is true of the DMCA safe harbor. A lot has changed since 1998 when the DMCA was enacted, and recently our government has been taking another look at it. In May 2020, the US Copyright Office released a special report on the safe harbor. It described a balancing act between "protecting the legitimate interests of authors and other rights holders against the threat of rampant, low-barrier online infringement" and giving service providers "legal certainty and leeway to innovate, for the benefit of not only their shareholders, but the public and the content industry as well." The Office received over 92,000 written comments about the safe harbor and noted "dramatically varied opinions" on whether this balance has been achieved. Rights holders wanted to make it easier to remove content and keep it down. Users' groups wanted stronger protections against erroneous takedowns. Service providers wanted to maintain the legal framework that has allowed them to operate without the constant threat of lawsuits. The Copyright Office thought that the balance had become "tilted askew" but stopped short of

recommending wholesale changes, recommending "fine-tuning" instead. So far the original DMCA safe harbor remains intact.

In the years leading up to the Copyright Office report, music copyright owners were especially concerned about YouTube and the meager amounts that it was paying them compared to the amount that streaming services like Spotify, who had to negotiate licensing deals, paid out. They said that the safe harbor had contributed to a "value gap" between the money YouTube earned from all of the music on its site and the revenue that made its way back to the copyright holders. YouTube later said that it was closing that gap—in June 2021, it announced that it had paid $4 billion globally to the music industry in the previous 12 months. Around 30 percent or $1.2 billion came from ads on user-generated videos. Analysts project that YouTube may eventually overtake Spotify as the top generator of global revenue for the music industry. If this happens, will it benefit the online music ecosystem overall? Or further entrench YouTube's dominance and impose barriers to entry for potential future competitors? Both? Time will tell.

There is one additional feature of the DMCA that you should know about: the **DMCA anti-circumvention rules** in § 1201 of the Copyright Act. As a counterweight to the safe harbor, the DMCA also added a new protection for copyright holders. When they were passing the law Congress explained: "Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy." This assurance took the form of special protection for "technological measures"—often referred to as "digital rights management" or DRM—that are used to control what people can do with digital works. These include paywalls and encryption that prevent you from gaining access to works without the right password or key. They also include the technological controls that restrict what you can do with a work once you have access to it. With streamed music, DRM is what keeps listeners from downloading and sharing songs or playing them on an unauthorized player. To shore up these technological measures, the DMCA made it illegal to *circumvent* them. It also outlawed the distribution of *tools* that allow others to circumvent them. So hacking the DRM on your streaming audio, or offering a program that lets others do the same, could violate the DMCA. In practice, however, these kinds of tools are nevertheless available online.

This extra protection meant that copyright holders could distribute their content digitally without relinquishing control over it, giving them the confidence to enter the digital marketplace. For consumers, however, DRM has caused problems—sometimes it gets in the way of legitimate uses of content they have paid for, or even causes them to lose access to that content entirely. In an extreme example, Kindle's eBook technology let Amazon remotely delete George Orwell's *1984* and *Animal Farm* from readers' Kindle devices in 2009, removing not only the books but also students' notes and annotations. It seems almost…Orwellian.

11.4 TANGLED UP IN LICENSES

Earlier in this chapter you read about startups such as Napster and Grokster that flouted copyright law and were eventually found guilty of secondary liability for enabling illegal downloading by their users. You also learned about how the DMCA can shield services such as YouTube when they are hosting content uploaded by users. This section turns to services which are in a different position: they stream music *directly* to listeners and are therefore not within the framework of the DMCA safe harbor or secondary liability. And unlike Napster or Grokster, their business model is premised on being *legal* and complying with copyright law. These services need to clear rights in order to stream copyrighted music.

What licenses do services such as Spotify, Apple Music, Amazon Music, or Pandora need to obtain? What if Calandra gave up on making it as a performer and decided she wanted to launch a new music streaming service? What licenses would she need to get in order to be "legit"? The answer is surprisingly complicated. As it turns out, the streaming business model—the one that delivers your music to you if you use services such as Spotify—has been built on top of an anachronistic legal foundation. Behind digital music delivery is a complicated royalty scheme, grounded in copyright law, playing in the background like bad Muzak. Unpacking it brings us all the way back to the progression of exclusive rights from Chapter Three.

Figure 11.2 presents the chart mentioned in that chapter. It summarizes the current music licensing framework and brings together the various rights and clearance mechanisms you learned about. To review, every piece of recorded music has two different copyrights attached to it: the © composition right and ℗ sound recording right. For each of those rights, there are then separate exclusive rights that have been added incrementally over time, along with different intermediaries and methods of payment. Take a look at these rights and how they connect to different uses. (If you are reading this in hard copy, you may want to go online to the free digital version of the book so you can zoom in on the image.)

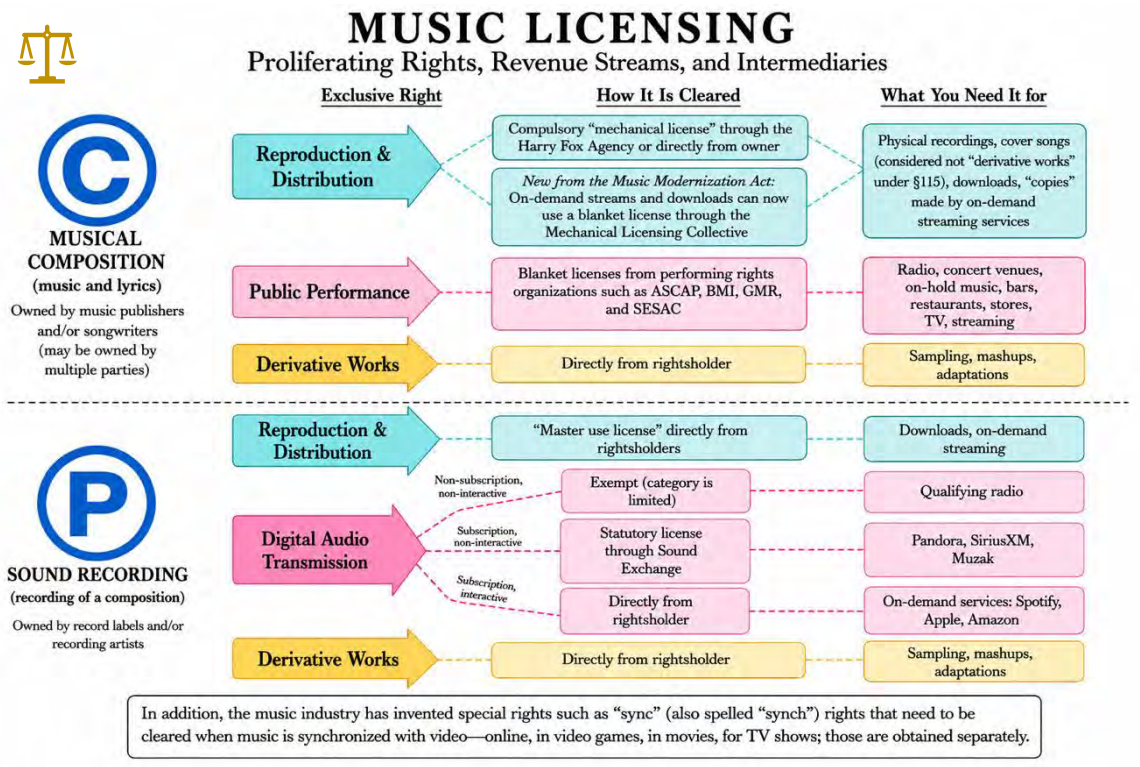

MUSIC LICENSING
Proliferating Rights, Revenue Streams, and Intermediaries
Exclusive Right
How It Is Cleared
What You Need It for
MUSICAL COMPOSITION
(music and lyrics)
Owned by music publishers and/or songwriters (may be owned by multiple parties)
Reproduction & Distribution
Compulsory "mechanical license" through the Harry Fox Agency or directly from owner
New from the Music Modernization Act: On-demand streams and downloads can now use a blanket license through the Mechanical Licensing Collective
Physical recordings, cover songs (considered not "derivative works" under §115), downloads, "copies" made by on-demand streaming services
Public Performance
Blanket licenses from performing rights organizations such as ASCAP, BMI, GMR, and SESAC
Radio, concert venues, on-hold music, bars, restaurants, stores, TV, streaming
Derivative Works
Directly from rightsholder
Sampling, mashups, adaptations
SOUND RECORDING
(recording of a composition)
Owned by record labels and/or recording artists
Reproduction & Distribution
"Master use license" directly from rightsholders
Downloads, on-demand streaming
Digital Audio Transmission
Non-subscription, non-interactive
Exempt (category is limited)
Qualifying radio
Subscription, non-interactive
Statutory license through Sound Exchange
Pandora, SiriusXM, Muzak
Subscription, interactive
Directly from rightsholder
On-demand services: Spotify, Apple, Amazon
Derivative Works
Directly from rightsholder
Sampling, mashups, adaptations
In addition, the music industry has invented special rights such as "sync" (also spelled "synch") rights that need to be cleared when music is synchronized with video—online, in video games, in movies, for TV shows; those are obtained separately.

Figure 11.2

Believe it or not, this is a *simplified*, high-level overview of music licensing that omits details about government rate-setting, antitrust consent decrees, industry deals, and fractured ownership. There are also specialized licensing arrangements that go beyond "sync" rights to things like ringtones, karaoke, jukeboxes, and dramatic performances such as musicals and operas. The music licensing landscape is Byzantine in its complexity. If it makes your head spin, you are in good company: even seasoned lawyers find it challenging to navigate, and for artists it is a source of frustration and bewilderment. Chance the Rapper, who launched his career on SoundCloud and was the first streaming-only artist to win a Grammy, encapsulated an artist's perspective nicely in a conversation at the University of Chicago. After explaining the different © and ℗ rights, he smiled at the audience and said: "None of that shit makes any sense, right? That shit didn't make any sense to you? Because that shit is goofy as hell." The audience response? Thunderous applause and laughter.[53]

So why is the system so complicated? As with the sample clearance process described in the last chapter, no one set out to design music licensing this way. It was not part of a grand plan, but rather an accretion of historical legal expansions and responses to new technologies. As you know, over a century ago, the mechanical license was enacted in response to player pianos and gramophones. Shortly thereafter we got the blanket license for public performances made by radio and other businesses. The derivative works and performance rights for compositions expanded over time. In 1972 the ℗ sound recording

[53] "Chance the Rapper and the Art of Activism" on YouTube (2016), at 29:52.

right was added to address "record and tape piracy." And in 1995—during the early days of the World Wide Web—℗ rights holders received the new "digital audio transmissions" right. As you can see in Figure 11.2, these transmissions are divided into three subcategories. Licenses for streams made by "interactive" services—on-demand services such as Spotify—have to be negotiated directly with the rights holder. "Noninteractive" services like some of the options available on Pandora, where listeners are not allowed to keep choosing individual songs, get an easier clearance mechanism—a statutory scheme with a set rate—on the theory that noninteractive streams are less likely to result in unauthorized copies that would displace the rights holders' other markets for downloads or physical audio formats. The exempt category includes traditional Federal Communications Commission-licensed radio stations that are broadcasting online and do not require a subscription from listeners.

Even amid the creative destruction described in this chapter, this thicket of rights has proven remarkably stubborn. Once a payment mechanism is in place, it is difficult to dislodge. Incumbents have entrenched interests and intermediaries are wedded to their role in the system. As with the sample clearance headaches discussed in Chapter Ten, there is general agreement that the framework is inefficient, but there is no politically expedient way to dismantle the whole thing and start from scratch. As the Copyright Office explained: "There is a widespread perception that our licensing system is broken…While there is general consensus that the system needs attention, there is less agreement as to what should be done." As a result, legal change will be incremental, adding to the existing scaffolding rather than reworking it.

How does this licensing framework apply to streaming? Figure 11.3 builds on Figure 11.2 by showing the number of licenses needed for different uses of music. Traditional activities were easier to clear than newer digital ones. As the Copyright Office explained: "This balkanized licensing scheme was not overly problematic during the analog age, when determining the boundaries between rights was relatively straightforward." Making a recording or playing a song on terrestrial radio required only a single license that was developed with that particular use in mind. But what happens when a new delivery mechanism is superimposed on an outdated legal infrastructure? With on-demand streaming, the licenses accumulate: playing a single song on Spotify requires clearing *four* different rights through a variety of mechanisms. Rube Goldberg would be proud.

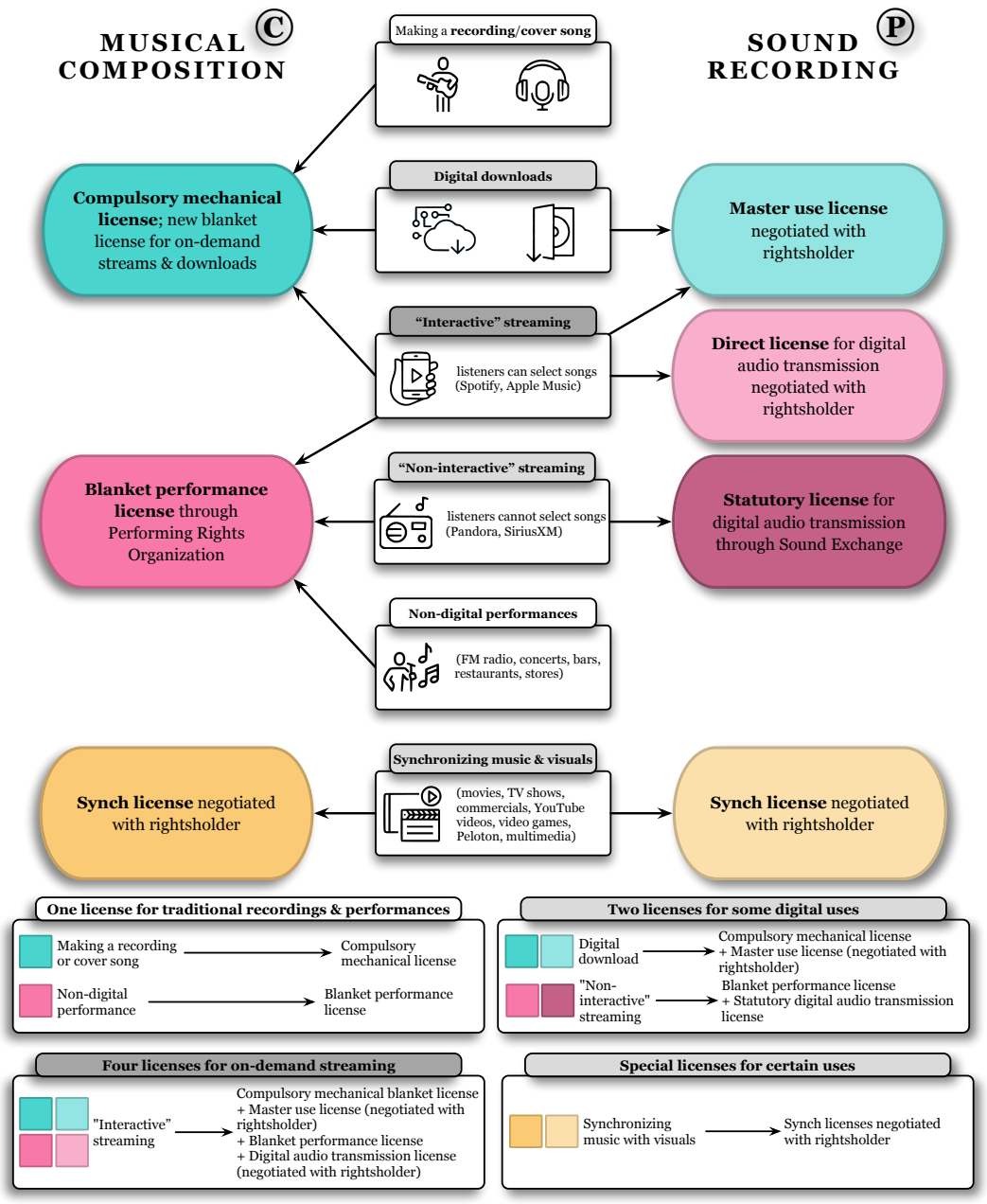

What License(s) Do You Need for the Following?
MUSICAL COMPOSITION ©
SOUND RECORDING ℗
Making a recording/cover song
Digital downloads
Compulsory mechanical license; new blanket license for on-demand streams & downloads
Master use license negotiated with rightsholder
"Interactive" streaming
listeners can select songs (Spotify, Apple Music)
Direct license for digital audio transmission negotiated with rightsholder
"Non-interactive" streaming
listeners cannot select songs (Pandora, SiriusXM)
Blanket performance license through Performing Rights Organization
Statutory license for digital audio transmission through Sound Exchange
Non-digital performances
(FM radio, concerts, bars, restaurants, stores)
Synchronizing music & visuals
(movies, TV shows, commercials, YouTube videos, video games, Peloton, multimedia)
Synch license negotiated with rightsholder
Synch license negotiated with rightsholder
One license for traditional recordings & performances
Making a recording or cover song
Compulsory mechanical license
Non-digital performance
Blanket performance license
Two licenses for some digital uses
Digital download
Compulsory mechanical license + Master use license (negotiated with rightsholder)
"Non-interactive" streaming
Blanket performance license + Statutory digital audio transmission license
Four licenses for on-demand streaming
"Interactive" streaming
Compulsory mechanical blanket license + Master use license (negotiated with rightsholder) + Blanket performance license + Digital audio transmission license (negotiated with rightsholder)
Special licenses for certain uses
Synchronizing music with visuals
Synch licenses negotiated with rightsholder

Figure 11.3

As shown in Figure 11.3 on-demand streaming services need to clear the following four licenses. On the composition side, there is the public performance license as well as the mechanical license, not for "copies" akin to piano rolls or records, but for digital copies that song. On the sound recording side, both the master use license and digital audio transmission license require direct licenses

> Ah, the joys of shoe-horning new technologies into a copyright law that was first written when wax cylinders were the rage.
>
> –Donald Passman

from the rights holder. Not surprisingly, complying with these requirements can be expensive and time-consuming. As Professors Peter DiCola and David Touve write: "In aggregate time, Spotify may have spent between forty-two and forty-eight months licensing the service for availability in the EU and US. For comparison, Napster operated for fourteen months, Grokster for forty-eight months, and Limewire for sixty-one months, while their respective copyright infringement cases worked their way through the courts—from the first cease-and-desist letter to the final court decision."[54] While these licensing hurdles were a hassle for Spotify, they also function on the other side as a **barrier to entry**, keeping new players without the wherewithal to clear them from competing with the incumbents. This has anticompetitive effects, resulting in less innovation by producers and fewer options for consumers.

What did the MMA do? One important development is the 2018 Music Modernization Act (MMA), which updated the *process* of clearing one of these four licenses—the mechanical license—for on-demand streams. Before this law, streaming services had to serve a "notice of intent" (NOI) on each song's copyright holder to comply with the compulsory licensing rules. With millions of copyright holders to notify, this requirement was infeasible, especially since there is no definitive record of copyright ownership. As you know, the law does not require a copyright notice or registration to claim copyright. The result was that many copyright owners were not being notified and never received their mechanical payments. Under the MMA, the streaming service can now obtain a one-stop *blanket* mechanical license from a government agency called the Mechanical Licensing Collective (MLC), which is then tasked with identifying songs and their owners and collecting and distributing the royalties. The MLC has also been given the task of developing a comprehensive database of copyright ownership for songs and sound recordings.

SUMMARY

This chapter followed two transformations catalyzed by digital technologies and the World Wide Web: the cycle of *creative destruction* experienced by the recording industry, and copyright law's growth from regulating *content* to being an important lever for regulating *technology*. Peer-to-peer file-sharing services were shut down under its secondary liability doctrines. The Digital Millennium Copyright Act gave internet services a safe harbor from copyright liability for infringing material hosted at the direction of users, so long as they expeditiously removed infringing content. It turns out that Schumpeter's "perennial gale" is

[54] Note as mentioned earlier that different services operate under a variety of legal schemes: YouTube, for example, has both user generated content covered by the DMCA and YouTube Music, its direct streaming service that requires getting the applicable licenses.

shaped by a very particular wind-tunnel: the dynamic relationship between technology, law, and business practices.

Earlier we studied how technological changes spur legal changes. The law is only part of the story, however. Systems such as YouTube's Content ID program take that progression one stage further. Content ID automatically scans new uploads to see if they match the audio or video of tracks that have been submitted to it and implements preexisting agreements to handle them—blocking, monetizing, or tracking. From technological change *provoking* legal change we have moved to technological filters *enacting* legal change, or at least making decisions that, practically, have the force of law—a "judge on a chip," as it were. Here the law has taken a back seat to private entrepreneurial solutions—webs of private agreements that displace public law with deals between powerful conglomerates.

At the end of the day, contrary to doomsaying predictions, the recorded music business—and the copyright laws undergirding it—have survived and even thrived in the digital world. Schumpeter's gale closed the doors on one business model and opened the door to a new one. The streaming economy appears to have rescued the recorded music industry from its post-Napster decline. The inefficient and antiquated licensing infrastructure discussed in this chapter threw sand in the wheels of both progress and payment. But things are moving nonetheless.

The next chapter picks up where this chapter leaves off, with today's technology. It focuses in particular on two technological transformations of music. The first is the rise of music streaming. We will have come all the way from "talking machines" and radio to the predominant way we enjoy music today—streaming—and we will explore how the creative, legal, and business landscape has adapted to this new reality. But if streaming seemed to rewrite the rules of the game, it pales in terms of impact compared to our current technological moment: the rise of generative AI. This is a technology that promises not just to rewrite the rules, but to change everything about the game, from the players, to the shape of the board, to the meaning of the game in the first place.

12

The Music Streaming Era and AI

Inside This Chapter

12.1 THE STREAMING ECONOMY 315
12.2 TAPPING THE STREAMS 319
12.3 "HARD WAY TO MAKE AN EASY LIVING" 324
12.4 A CELESTIAL JUKEBOX 330
12.5 HOW ALL OF THIS SHAPES THE MUSIC… 340
12.6 FROM BORED APES TO SOUNDSCAPES 341
12.7 AMADEUS EX MACHINA? 343

We have come a long way since the beginning of this book. As a result of the creative destruction described in the previous chapter, the music industry looks very different than it did even a few decades ago. Many forces were operating in the background. Among them was copyright, which helped to lay the ground rules for, and indeed played a major role in shaping, not only music delivery but the internet as we know it.

In Chapter Three you read about two revolutionary technologies from the last century—sound recordings and radio. The end of the chapter posed the question: "What happens when the internet transforms the music industry again?" That is the focus of this section. It is time to explore how the streaming economy impacts not only the industry and rights holders but also artists, fans, and *music* itself. You will learn how streaming revenue gets distributed, how Spotify's algorithm serves up what you want to hear, and how TikTok is a potential game changer. And you will be introduced to some developments involving NFTs and the Metaverse, both of which appear to have vanished in a cloud of their own hype. The chapter will conclude with generative AI, a technology that may be more Schumpeterian in the transformations it promises than anything we have discussed so far.

Technology moves fast. This chapter provides a snapshot of a particular moment in time. By the time you read it, *details* will have changed—perhaps significantly. The benefit in taking a longer view, though, is that I am relatively confident its *themes* will endure. My aim is to provide you with takeaways and analytical tools that will be useful in processing and understanding the next round of technological change, *whatever* tomorrow brings.

We begin with a high-level chart (Figure 12.1) that depicts a few of the seismic shifts brought about by the streaming era.[55] As you read them, think about how the world has changed for the music business, artists, and listeners.

👉 How the Streaming Economy Impacts the Industry, Artists, and Fans

		BEFORE	NOW	IMPLICATIONS
BUSINESS	Product->Service	Music was sold as a physical commodity–records, tapes, CDs	Music is provided as a service, a continuous *experience,* paid for by monthly subscriptions or ad revenue	Steady income from subscriptions; shifts in revenue-per-user calculus and how music is valued by listeners
	$$ per album -> $$ per stream	Owners received the same $$ per album sold whether you listened to a song 0 or 1000 times	Owners are paid per stream; more listens = more $$ and fewer listens = fewer $$	Creative and marketing energy focused on generating more streams; catchy music frontloaded so people listen long enough to trigger payment
	Throw out the old playbook	Conventional set of revenue streams and marketing tools gave industry a playbook to work from	More revenue streams and outlets than ever–from multiple platforms to video games and much more	More options, but business models are in flux

Figure 12.1

(continues)

[55] This terminology is also used by Dmitri Vietze's "Music Tectonics" conference and podcast.

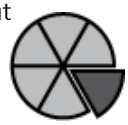
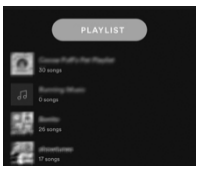
		BEFORE	NOW	IMPLICATIONS
ARTISTS	Other artists' streams can diminish your payout 	$$ received for one artist's album does not affect $$ for another artist's album (though it diminishes the disposable "music $$" of consumers and thus does so indirectly)	On services such as Spotify, when one artist gets more listens, other artists get less money because the overall $$ pool is divided among artists pro rata	An alternative is user-centric rather than pro rata payment; sometimes this can benefit less popular artists but results vary
	Tour, tour, tour	Touring and live performance = important source of revenue for some artists	Touring and live performance = important source of revenue for some artists	This hasn't changed, though streaming can now drive fans to shows or *vice versa*
	Direct-to-fan	To "make it," artists signed deals with labels and publishers	Now there are direct-to-fan options coexisting with the conventional route	Greater number of ways to make money from music but no guarantees
	Most artists still struggle to make a living	This…	Hasn't…	Changed…
FANS	Album->Playlist 	Songs came bundled in albums featuring numerous songs by the same artist	Songs are now grouped in playlists put together by users or streaming services, culled from multiple artists and cued to activities, events, moods	Artists increasingly produce singles rather than albums; curation often happens through algorithmic recommendations and playlist generation
	More music than ever	Available music was limited to what you found on the radio, recordings, jukeboxes, or at live shows	Streaming services offer an on-demand, all-you-can-eat cornucopia	More music than ever, including niche options
	New tools for music discovery	Music was discovered through radio play, word of mouth, record stores, live shows	More and more music discovered through streaming services, social media, and editorial and algorithmic playlists	Curation and discovery are in different hands, driven by a combination of humans and algorithms and lots of data
	Music is interactive	Music was consumed through listening	Opportunities for interactive participation—see TikTok	The rise of user generated content and influencers

Figure 12.1

12.1 THE STREAMING ECONOMY

What follows is a snapshot of the streaming economy. While the details will inevitably have changed by the time you read the book, some of the broader stories will likely still resonate. This includes the business transition described in section 12.1 and the complexities driving the payment structure and meager artist revenue covered in sections 12.2 and 12.3. You are likely still experiencing the abundance of music and changes to the art form explored in sections 12.4 and 12.5. The streaming era is still fresh, but another round of technological disruption is upon us. As we face the oncoming transformation AI will bring to music, a number of themes from the streaming era will reappear. **History does not repeat itself, but it does harmonize.**

For the music business, the entry to the streaming era has been a time of adjustment. The resurgence of profits and the steady income from streaming are a welcome relief for the recording industry. In 2025, US wholesale revenue for recorded music rose to a record high of $11.5 billion. Streaming accounted for 82 percent of that revenue, and paid subscriptions reached $6.4 billion. The resurgence of vinyl sales continued, surpassing $1 billion.

Even though the industry is enjoying a long-awaited recovery, the old business model is gone. Legacy players such as record labels are having to redefine their roles and strategies. New revenue is coming in, but as the overall pie gets larger, the slices are being redistributed to more and different players. Who ultimately wins and loses remains to be seen.

Just as the introduction of sound recordings and radio brought us record companies and broadcasters, digital music delivery brings us platforms for finding and listening to music. There are what the music industry calls “Digital Service Providers” or “DSPs”—these include Spotify, YouTube Music, Apple Music, Amazon Music, and Deezer. There are also platforms where artists or users can upload music—these include SoundCloud, Bandcamp, TikTok, and regular YouTube. While these companies all offer music in some form, their business models and the legal framework in which they operate vary. Some have direct licenses from copyright owners. Some host user generated content and work within the Digital Millennium Copyright Act (DMCA) safe harbor. Some do both.

As of the first quarter of 2026, Spotify is the world’s largest music streaming service, with over 761 million monthly active users and 293 million premium subscribers. Because of its outsized influence in the streaming economy, much of this chapter will use Spotify as an example. Market share is different from profitability, however, and until 2024 Spotify struggled to turn a consistent profit. Unlike Apple or Amazon, Spotify did not have another core business to rely on—it was born a streaming service. Figure 12.2 is a timeline showing Spotify’s development through early 2022.

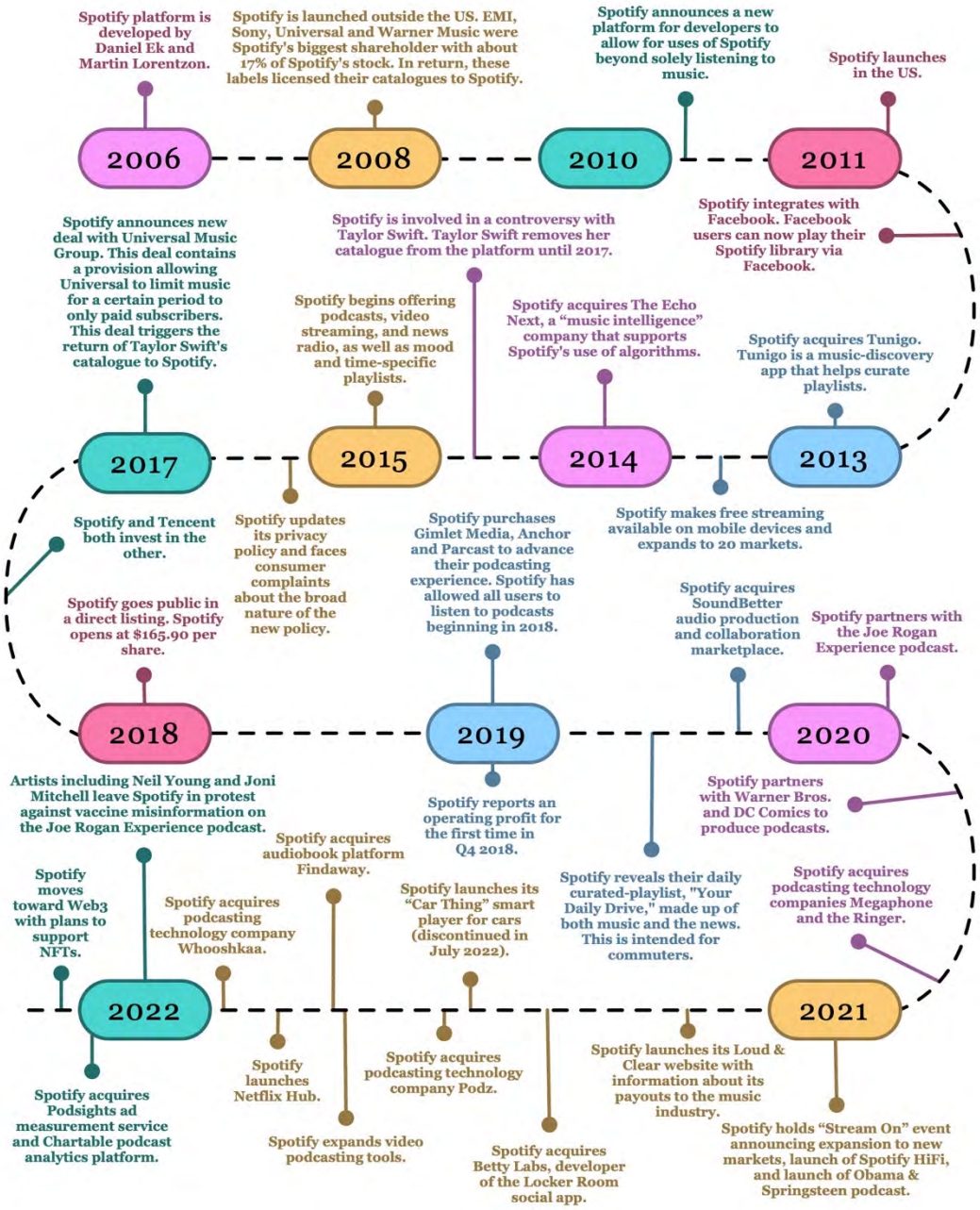

Spotify platform is developed by Daniel Ek and Martin Lorentzon.
2006
Spotify is launched outside the US. EMI, Sony, Universal and Warner Music were Spotify's biggest shareholder with about 17% of Spotify's stock. In return, these labels licensed their catalogues to Spotify.
2008
Spotify announces a new platform for developers to allow for uses of Spotify beyond solely listening to music.
2010
Spotify launches in the US.
2011
Spotify integrates with Facebook. Facebook users can now play their Spotify library via Facebook.
Spotify acquires Tunigo. Tunigo is a music-discovery app that helps curate playlists.
2013
Spotify makes free streaming available on mobile devices and expands to 20 markets.
Spotify acquires The Echo Next, a "music intelligence" company that supports Spotify's use of algorithms.
2014
Spotify is involved in a controversy with Taylor Swift. Taylor Swift removes her catalogue from the platform until 2017.
Spotify begins offering podcasts, video streaming, and news radio, as well as mood and time-specific playlists.
2015
Spotify updates its privacy policy and faces consumer complaints about the broad nature of the new policy.
Spotify announces new deal with Universal Music Group. This deal contains a provision allowing Universal to limit music for a certain period to only paid subscribers. This deal triggers the return of Taylor Swift's catalogue to Spotify.
2017
Spotify and Tencent both invest in the other.
Spotify goes public in a direct listing. Spotify opens at $165.90 per share.
2018
Spotify purchases Gimlet Media, Anchor and Parcast to advance their podcasting experience. Spotify has allowed all users to listen to podcasts beginning in 2018.
2019
Spotify reports an operating profit for the first time in Q4 2018.
Spotify acquires SoundBetter audio production and collaboration marketplace.
Spotify partners with the Joe Rogan Experience podcast.
2020
Spotify partners with Warner Bros. and DC Comics to produce podcasts.
Spotify reveals their daily curated-playlist, "Your Daily Drive," made up of both music and the news. This is intended for commuters.
Spotify acquires podcasting technology companies Megaphone and the Ringer.
2021
Spotify launches its Loud & Clear website with information about its payouts to the music industry.
Spotify holds "Stream On" event announcing expansion to new markets, launch of Spotify HiFi, and launch of Obama & Springsteen podcast.
Artists including Neil Young and Joni Mitchell leave Spotify in protest against vaccine misinformation on the Joe Rogan Experience podcast.
Spotify moves toward Web3 with plans to support NFTs.
Spotify acquires podcasting technology company Whooshkaa.
Spotify acquires audiobook platform Findaway.
Spotify launches its "Car Thing" smart player for cars (discontinued in July 2022).
2022
Spotify launches Netflix Hub.
Spotify expands video podcasting tools.
Spotify acquires podcasting technology company Podz.
Spotify acquires Betty Labs, developer of the Locker Room social app.
Spotify acquires Podsights ad measurement service and Chartable podcast analytics platform.

Figure 12.2

12.2 TAPPING THE STREAMS

You may subscribe to a streaming service or listen to ad-supported music on one. How do these proceeds get distributed to the parties who created and delivered that music—the DSP, music companies, and artists? There are billions of dollars coming in from streaming each year, but there are also many mouths to feed. In the previous chapter you learned about the music licensing framework for services such as Spotify. Now let us look at some numbers,

and how incoming revenue gets split up, so that we can understand how both businesses and artists are compensated in the streaming economy. The legal rights are only part of the story: the actual percentages are determined by another layer of complexity that includes government rate-setting proceedings, industry practices, negotiations by intermediaries, and confidential contractual terms.

Figure 12.3 is a chart showing how $100,000 in streaming revenue might make its way to the DSP, music rights holders, and artists. To make the math easier, it uses round numbers and ballpark figures. It begins with a hypothetical service that has 1 million total streams per month and $100,000 in monthly revenue, and it is focused on a song that is streamed 1,000 times. These are only simplified numbers for the purpose of illustrating how money might flow according to standard revenue splits. Notice how little ultimately makes it to the artists—as Meredith Rose from the public interest group Public Knowledge put it: "The consumer-to-artist money pipeline is not a funnel; it's a fire sprinkler." For an in-depth account of payment flows, anticompetitive practices, and inequality in the streaming market, read Rose's paper *Streaming in the Dark, Where Music Listeners' Money Goes—and Doesn't*.

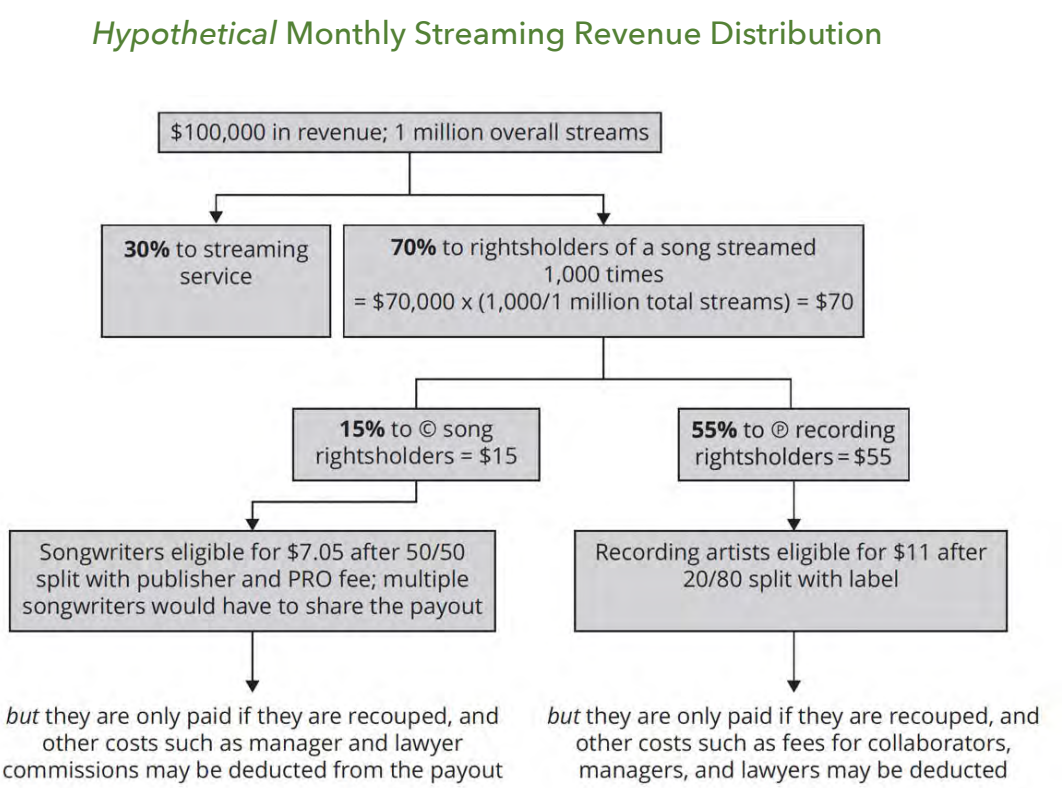

Hypothetical Monthly Streaming Revenue Distribution
$100,000 in revenue; 1 million overall streams
30% to streaming service
70% to rightsholders of a song streamed 1,000 times
= $70,000 x (1,000/1 million total streams) = $70
15% to © song rightsholders = $15
55% to ℗ recording rightsholders = $55
Songwriters eligible for $7.05 after 50/50 split with publisher and PRO fee; multiple songwriters would have to share the payout
Recording artists eligible for $11 after 20/80 split with label
but they are only paid if they are recouped, and other costs such as manager and lawyer commissions may be deducted from the payout
but they are only paid if they are recouped, and other costs such as fees for collaborators, managers, and lawyers may be deducted

Figure 12.3

Here is a summary of the math behind the numbers. Figure 12.3 assumes a ballpark 30/70 split between the DSP and rights holders that is close to what Spotify has reportedly used in

the past.[56] Of that 70 percent, it then uses a distribution between the © and ℗ rights holders of 15 percent and 55 percent, or a roughly 21/79 split. (The labels receive more than the publishers—we will return to this disparity in a moment.) 15 percent is rounded from the current rate set by the Copyright Royalty Board for DSP payments to © holders—while the specifics are more detailed, the basic, simplified rate is 15.3 percent in 2026, increasing to 15.35 percent in 2027.

On the © side, the chart assumes that the songwriters and publisher have a 50/50 split for both mechanical and performance royalties, with the performing rights organization (PRO) taking a 12 percent share of the latter, and notes that the songwriter's share may then be reduced by payments to managers and lawyers. Songwriter arrangements with publishing administrators, who offer fewer services than traditional publishers, might carry a 75/25 split—in that case the songwriters would keep more money. On the ℗ side it assumes a representative 20/80 split between the recording artist and label. That artist's income might then be reduced further by payments to collaborators—producers, mixers, guest artists, owners of the rights to samples—as well as fees for managers and lawyers. Some recording artists, particularly famous ones, may negotiate better deals with their labels and keep more of the proceeds. Artists who self-release or sign with independent labels will also fare better.

The bottom of the chart explains that artists will not receive anything from streaming until they are recouped. As discussed in Chapter Ten, major label contracts often require artists to pay back their advance as well as expenses for recording, promotion, touring, etc. before they receive any royalties. Until then, they have a negative balance, and it may take millions of streams until they even see the first cent of streaming revenue. We will discuss the meager payments that make it to songwriters and performers in the next section.

Notice that the revenue flowing to rights holders depends on their song's proportion of the total streams on the platform, not just the raw number of streams. **This is the "pro rata" payment model used by most major on-demand streaming services, including Spotify.** The hypothetical song here received 1,000 out of 1 million overall streams on the service. This means that its owners receive 0.1 percent of the $70,000 allocated to all rights holders, or $70. But if the overall number of streams was 2 million—because other artists get more listens, or users are streaming more music—the revenue for the same 1,000 streams would be 0.05 percent of the proceeds, or $35, giving the owners a lower payout rate.

Some have argued that this is unfair. Is one artist's success diminishing the share available to other artists? Payment seemed different in the analog world where there was a linear relationship between record sales and royalties. Now one artist's success can deplete

[56] Spotify's 2023 "Loud & Clear" report, which presents its 2022 royalty data, says "Spotify pays out nearly 70% of every dollar we generate from music back to the industry." Other sources put the ballpark split at around 31/69. Not all services take this much off the top though. Bandcamp is often lauded as an artist-friendly service, and it takes only 10-15% of revenue. Its focus is less on streaming and more on letting fans directly support artists, including through the purchase of physical products such as merchandise and albums. In 2020 its founder Ethan Diamond told NPR: "I don't think of [Bandcamp] as a streaming service. I consider us a record store and a music community. The primary difference being that we're a way to directly support the artists that you enjoy listening to. You know, half of the sales on Bandcamp at this point are for physical goods."

another's revenue, and a higher volume of streams lowers everyone's per-stream rate. But, in reality, this is not that different from earlier eras. Consumers don't have an infinite budget for music. Imagine yourself in the world of CDs. If you bought a Rolling Stones album, you had less money to spend on an album by the Beatles. More popular artists had more album purchases. Lesser-known artists found a diminished pool of purchasing dollars chasing their work. Nevertheless, the pro rata model is controversial. Is it flawed?

The answer depends on how you look at the bigger picture. In the book *Rockonomics*, economist Alan Krueger pointed out that streaming is not a "zero-sum game" where artists are competing for their share of a static revenue pool. If a service attracts more *subscribers*, everyone's share will increase. And if those users stream more, this could have broader benefits for the music community. Perhaps the service is better at recommending and delivering music and users are more engaged, raising all boats. Smaller artists could benefit from exposure to high-consumption listeners even if they listen mostly to popular artists. Krueger also argues that in reality—setting aside the simplified chart in Figure 12.3—when there are billions of streams from millions of artists, "the size of the pie is so large that the quantity of one artist's streams does not meaningfully affect the share accruing to any other artist."

Still, it is worth considering other ways of distributing streaming revenue. Some services have experimented with various **"user-centric" or "fan-powered" models** that pay rights holders based on their proportion of streams from each user instead of aggregate streams, with the user's subscription fee allocated only to the tracks they stream. Some believe this is fairer to artists—particularly niche artists. In reality, how artists fare under this model will depend on a multitude of variables, including how many users they have relative to total stream count and how much those users pay for streaming, as well as the streaming patterns of those users—how much music they stream and how many different artists they listen to during the payment period.

In any event, the user-centric model has not yet been widely adopted. Among other things, administering it is more intricate than simply paying for a song's percentage of overall streams. Streaming services have announced tweaks to the pro rata system, particularly "artist-centric" adjustments designed to increase payments for "professional artists." In practice, this is likely to boost payments for those who have more than a minimum level of streams and whose work is deliberately searched for rather than merely served up by an algorithm. The goal is to reduce payouts resulting from fraud, "noise" tracks, and passive listening.

Since the pro rata method is the dominant approach, it was used for the earlier chart. Note that the chart is merely an approximation—in practice, exact numbers will vary significantly depending on the players and contracts involved. The ability to offer better figures is hampered by the "black box" of private deals and non-disclosure agreements that hide the details of how streaming revenue is actually distributed. The need for simplicity affects the chart in other ways: it focuses on how revenue is divided and does not delve into the *order* of payments to various parties, different rates for international streams, special

deals, and other details. It also does not go into the variety of artists' roles—some artists are either songwriters or recording artists, while others are both—or the complexity of their particular arrangements. But the chart does offer a representative payment schematic.

As streaming revenue grows, the publishers, labels, and DSPs—today's new entrant—have been vying for their share of the pie. How does each group frame their role in the current ecosystem? Remember the 1906 debates from Chapter Three between the composition copyright holders and the nascent recording industry—the disruptive technology of the day? Here are some of today's arguments made in the context of government rate-setting proceedings.[57] They may sound familiar. David Israelite from the National Music Publishers' Association points out: "Without the songs there would be no recordings—and there would be no music store." This is the same point that John Philip Sousa made when he said those early recordings were worthless without "the stuff that we write"! Framings like this put the composers, and the publishers who own and administer rights to their work, front and center.

For their part, the DSPs echo the recording industry representatives in 1906 by highlighting their role in buoying the profits of the legacy players. Spotify states: "Since 2015, the music industry has experienced a historic turnaround. Nearly every passing week brings news of record-breaking earnings for record labels and music publishers, and eye-popping valuations for music publishing catalogs. Spotify, and other services like it, are among the primary reasons for this 180-degree shift from the state of the industry a decade earlier." Notice how Spotify is framing the issue. In that quote, they are the source of the Nile for the music business and its recovery.

Turning to the split between the ℗ and © owners: as mentioned before, the sound recording copyright owners receive a much larger share of revenue than the composition copyright owners. Why? Historically, labels were responsible for many of the costs of getting music made, delivered, and marketed. They played a pivotal role in talent spotting and development, paid for studio time, manufactured and distributed the physical media (records, tapes, CDs), and got the recordings played on the radio and into record stores. But with digital music there are no physical manufacturing costs, and in the online world social media and DSPs can play a significant role both in launching talent and in promoting their songs. Is the labels' larger share still justified, or should there be more parity between the proportion of streaming revenue paid to ℗ and © owners? The labels assert that they still incur significant marketing and other costs, and that when they boost sales this benefits the publishers as well. Mitch Glazier of the RIAA has argued for the labels' continued relevance in the streaming economy: "labels are seizing the moment, investing more in A&R,[58] marketing and other artist support activities (like data insights) than ever before, and beefing up their teams to support a vastly more complex, personal, and fast-paced music economy."

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[57] Specific rates will change over time because of these proceedings. They are hard-fought and complex and are focused on the all-in rate that DSPs pay to © holders for mechanical and performance rights, but this payout can also affect the remainder going to other parties.

[58] "A&R" stands for "artists and repertoire," the division at a music label that is responsible for talent scouting and artist development.

The struggle over streaming revenue does not mean that the various stakeholders always have antagonistic interests, however. Indeed, there might be the opposite problem—industry consolidation leading to an absence of competition. The three major music companies own both record label and music publishing divisions, as well as distribution arms. And some are partners with DSPs: as indicated on the Spotify timeline, when Spotify started in 2008 the major music companies together were its largest shareholder, owning around 17 percent of its stock. In the 2021 book *Music Copyright*, Casey Rae argues that change in the copyright system is stymied by this kind of consolidation: "One barrier to reform is that many in music and tech are highly invested in the current system…make no mistake about it: the consolidated music companies and the global digital service providers are in business with one another. And everyone else goes along for the ride according to economic terms set by the biggest interests in music and tech (or the federal government)." He calls for a renewed focus on two other intended beneficiaries of the copyright system—artists and the public. The next two sections will focus on each of those groups in turn. You can find more extensive discussion of how anticompetitive behavior and monopsony power impact culture and creative labor in the excellent book *Chokepoint Capitalism* by Rebecca Giblin and Cory Doctorow (Chapters 5 and 6 are on "Why Streaming Doesn't Pay" and "Why Spotify Wants You to Rely on Playlists").

12.3 "HARD WAY TO MAKE AN EASY LIVING"[59]

For artists, the current era offers both exciting opportunities, but also familiar challenges. **There are more ways to gain exposure and to be heard. But for artists who want to pursue music as a career, it is difficult to make a living from streaming revenue alone**. They would also need to make money from live performances and other activities. Streaming services offer artists the potential to reach more fans than ever before, but they also have to compete with a lot more music, not just other songs being released in the same cycle.

The distribution of streaming proceeds is top-heavy, with most of the earnings going to the top echelon of superstars. In its annual "Loud and Clear" report, Spotify points out that things are less skewed than they used to be: "there are now more artists generating over $100K a year from Spotify alone than were getting stocked on record store shelves at the height of the CD era." In 2025, more than 13,800 artists generated at least $100,000 in royalties on its platform. Spotify adds that "it's not just the biggest artists making more": in 2025 the 100,000th highest-earning artist made over $7,300 in royalties, compared to $350 in 2015, "more than a twentyfold increase in just a decade." With radio, the top 1 percent used to receive almost all of the airplay; streaming improves the odds. But the revenue opportunities are still limited.

For many artists with respectable listener numbers, streaming proceeds will not pay the bills. The tangle of rights and the sclerotic business practices mean that very little trickles down to the creator. As summed up by *Billboard* magazine: "Many people inside the industry

[59] The title of this section is a song by Toby Keith.

think royalty payments are a convoluted, nonsensical mess that doesn't pay artists and songwriters fairly." Sometimes people never get paid at all. One reason for this is a lack of metadata that tells the money where to go—as networks of collaboration and ownership become more complex, inaccurate or missing metadata often thwarts efficient remuneration. Musicians also lose streaming revenue to fraudulent activity, AI-generated music, and non-music "noise" tracks.

As illustrated in the preceding section, artists only get a small share of overall revenue. Payouts per stream tend to be minuscule—only a fraction of a cent. The earlier chart used a fictitious scenario where the per-stream payment to rights holders for 1,000 streams would have been $0.07 ($70/1,000). If we look at the average per-stream royalty on Spotify, the numbers are even lower. Some sources estimate that Spotify pays between $0.003 and $0.005 per stream to rights holders. Note however that focusing on per-stream rates comes with an important caveat: these rates are contingent and will fluctuate depending on the variables discussed earlier—the artist's portion of aggregate streams, contractual provisions, and so on. It is difficult to get firm numbers on streaming payouts because estimates are inconsistent, details are kept secret, and determinants will vary across different scenarios. Average per-stream rates are also difficult to pinpoint from service to service because they are affected by external factors—if a service has a free advertising tier, for example, its per-stream payout will be lower than a service without one because ads bring in less revenue than subscriptions. Fixating on the precise per-stream numbers can be misleading. But, in general, it is fair to say that it takes an enormous number of streams to earn a living wage.

If we use the $0.003 and $0.005 per-stream estimate, after splitting this between the recording and composition side and deducting the contractual shares for labels and publishers, many recording artists and songwriters are taking home only a small fraction of that micropenny. It would take hundreds of thousands, if not millions, of streams per month to make a sustainable living. In 2021 the UK Intellectual Property Office issued an in-depth report called "Music Creators' Earnings in the Digital Era" which estimated, based on UK data, that "a sustained achievement of around one million UK streams per month may be some kind of guide to a minimum threshold for making a sustainable living out of music, at least in cases where UK streams are complemented by non-UK streams and other sources of income." Only 0.41 percent of the artists in their dataset were able to meet this threshold. Other sources of income would have to be found by 99+ percent of artists.

Songwriters such as Anita are often left with the smallest payouts, especially if there are multiple writers who have to share the proceeds. As a result, many songwriters reportedly still rely on old-school radio play to make ends meet. Emily Warren, who has written hits for Dua Lipa, Khalid, the Chainsmokers, and others, noted that "she knows songwriters with hundreds of millions of streams and Grammy nominations who still drive Uber for a living" while "a songwriter with just two big radio hits is set up to retire."[60] Perhaps things will

[60] While streaming services pay more to the ℗ owners than © owners, with radio play, the situation is reversed. Recall that under copyright law terrestrial radio stations do not pay the ℗ owners at all because there is no general public performance right for sound recordings. For a song written by Anita and performed by Calandra, only Anita would receive royalties. Anita is entitled to her share of the radio proceeds collected

improve—in 2026 Spotify said that songwriting payouts are growing and had increased two and a half times over the past five years.

Here is a comic excerpt showing artists trying to piece together ways of making a living in the current ecosystem.

RIGHT NOW, ARTISTS ARE PIECING TOGETHER WAYS OF MAKING A LIVING...
MORE PEOPLE THAN EVER ARE MAKING MUSIC AND MAKING MONEY AT IT...
...BUT MOST OF THEM ARE DOING IT ON THE "PRO-AM MODEL." MUSIC ISN'T THEIR ONLY GIG. IS THAT...
...GOOD?
...AESTHETICALLY SUSTAINABLE? FEWER VIRTUOSO RECORDING MUSICIANS WHO SPEND A YEAR ON AN ALBUM?
...FEWER PEOPLE WHO WRITE SONGS FULL TIME?
IS THAT WHAT WE WANT?
MAYBE...AND MAYBE NOT!
ADS
VIDEO GAMES AND RINGTONES
LIVE PERFORMANCE
DOWNLOADS
MERCH
STREAMING ROYALTIES
ALLOWING MORE PEOPLE TO BE CREATORS...THAT'S THRILLING!! WE SHOULD CELEBRATE IT, BUT...
...A SYSTEM THAT MAKES IT HARD FOR THEM TO BE CREATORS FULL TIME... NOT SO MUCH.

and disbursed by her performing rights organization (PRO) according to the PRO's formula, which takes into account the type of radio station and how much the work aired. There are added bonuses for hit songs and songs that have become classics. A 2012 *Rolling Stone* article estimated that, for songwriters, "a massive hit like 'Rolling in the Deep' or 'Poker Face' can make as much as $500,000 per year just in radio royalties." In addition to radio royalties, Anita will also make money from her share of the $.091 compulsory licensing fee every time a recording, including a cover version, of her song is sold on a physical format or as a download. If a song is sufficiently popular, this non-streaming income can add up. Remember the large damage awards in the "Blurred Lines" and "Dark Horse" cases? Part of the reason they were so high was because they were calculated according to the considerable earnings that the accused songwriters had made off of those songs.

In reality, the "live performances" puzzle piece above would be much larger for artists who can successfully go on tour, because a tour can bring in a lot more revenue than streaming royalties. To revisit David Bowie's quote from the previous chapter, when music flows like water or electricity, a live show remains "unique." Fans are willing to shell out a lot of money to get in the door, and artists generally retain more of the earnings from live performances than for recordings. Not all artists benefit from touring, however: for smaller acts, the costs of the tour often exceed the revenue it brings in. And while touring is sometimes lucrative, it is not for everyone. It is exhausting, and favors artists who can put on a show and attract a large audience over those who, while technically excellent and even much-loved, are more comfortable in the studio.

There is an interesting dichotomy here. **Touring is a highly-valued experience good, while the cornucopia of music we spend most of our time listening to comes at the relatively modest cost of around $12 a month.** While this price is nice for consumers, there is doubt about whether it is sustainable for producers. Spotify has recently begun incrementally raising its subscription prices. This is only the first step, though. Some have argued that even if the pie gets larger, so long as the allocations are still inequitable, then the inequities will merely be compounded, even if everyone is technically better off.

What about the *upsides* of the streaming era for artists? Yes, many musicians still struggle to make a living. But there are opportunities that did not exist a few decades ago. In particular, artists have **alternatives to traditional recording contracts**.

Artists used to rely on labels for making recordings and getting them on the radio and into brick and mortar stores.[61] Laying down tracks required a recording studio; distributing physical formats required a pressing plant, trucks, and warehouses. This all was expensive. Labels covered the up-front costs and took the risk that artists would not succeed. But, in exchange, artists were asked to sign restrictive contracts, giving up to the label their copyrights and most of their royalties. Without bargaining power, attracted by the large advance payments, and often with imperfect information about the ramifications of the deal, they signed on the dotted line.

However, as discussed earlier, the musicians then did not see any royalties until they repaid not only the entire advance but all the costs of producing the record, something that is rare in any other industry. Even after that, the label still kept the lion's share of the royalties. The label also got creative control over what was produced. And, importantly, it was the label and not the artist who retained ownership of the "masters"—meaning the sound recording rights. This gave the label the authority to decide what to do with the recording: whether to license it for a film, TV show, or advertisement, for example.

Sometimes artists' payments were reduced by anachronisms in recording contracts that were carried over into the digital world. For a while, contracts still included automatic deductions from the artist's payment for (literal) broken records—called "breakage," from

[61] The focus here is on recording artists—their contracts were especially skewed to reflect the costs footed by labels, though songwriters also had to share a lot of their proceeds with publishers. Songwriters who also perform such as Taylor Swift would have both recording and publishing deals.

the days when records were made of shellac—as well as packaging and free goods, even when the artist was selling *digital downloads*. Now, with streaming, "breakage" refers to a larger category of income that is not linked to particular songs. For instance, when a streaming service pays a label an advance for its catalog and that advance exceeds the proceeds that come in from actual streams, that surplus is called breakage. Until recently, some labels reportedly kept that extra money for themselves. A contract between Sony Music and Spotify that was leaked in 2015 suggested that Sony structured the deal to maximize potential breakage—it received advances from Spotify of $25 million in the first two years and $17.5 million from an optional third year along with discounted ad space and other perks. Experts said that Sony likely did not share the resulting breakage with its artists. After the ensuing controversy, Sony said it would share this income with artists.

In the past, labels have also made inconsistent arguments in order to pay musicians less. One example involves digital downloads. For consumers, the labels classified downloads as *licenses* rather than *sales.* This enabled the control of post-purchase behavior: the purchaser did not own the download the way they owned a CD, which they could resell or share; instead they got a license for the track and were bound by terms and conditions preventing resale and other activities. But when it came to *artists*, the labels classified downloads as *sales* rather than *licenses*. Why? Because recording contracts stipulated a lower royalty rate to artists for sales—around 12-20 percent—than for licenses, which paid 50 percent. In the 2010 case *FBT Productions v. Aftermath Records* involving the rapper Eminem, the Ninth Circuit Court of Appeals held that downloads fell within the license category of the relevant contracts and were subject to the higher 50 percent royalty.

Getting your rights back

There is an important provision in copyright law called "termination of transfers" that allows artists to regain the rights they have signed away after around 35 years. This is important to keep in mind for older artists. It can be a contentious process and success is not guaranteed, but lots of artists with decades-old hits are now getting their rights back, including George Clinton, as discussed in Chapter Ten.

All of this has led many, including me, to believe that conventional record label deals were overly one-sided, and to hail the developments—from the rise of artist-friendly labels to new "direct-to-fan" models—that promise to introduce some much-needed competition into the business. From the perspective of the major labels, however, this criticism is unfair. They cover the upfront costs of making the recording, with considerable risk that it will not be successful. They are taking this risk so that the artist has the opportunity to be a rock star. Willing buyer, willing seller. Where is the harm? This response would be more convincing if there were not information asymmetry and a lack of transparency in the negotiation process, if competition in music contract terms had been faster to develop, and if even superstars such as Taylor Swift did not loudly protest the provisions in their contracts.

Taylor's Version

Taylor Swift has focused public attention on the unfairness of recording contracts. In 2019, the American Music Awards named her the Artist of the Decade, but the people who owned her masters reportedly refused to let her play her own songs at the ceremony, based on a clause in her contract that did not allow her to re-record her works for a certain period. Photo 12.1 shows her tweet expressing her desperation.

"Guys, it's been announced recently that the American Music Awards will be honoring me with the Artist of the Decade Award at this year's ceremony…I've been planning to perform a medley of my hits throughout the decade on the show. Scott Borchetta and Scooter Braun have now said that I'm not allowed to perform my old songs on television because they claim that would be re-recording my music before I'm allowed to next year… This is WRONG. Neither of these men had a hand in the writing of these songs. They did nothing to create the relationship I have with my fans…I just want to be able to perform MY OWN music. That's it."

Taylor Swift
@taylorswift13
Don't know what else to do
planning to perform a medley of my hits throughout the decade on the show. Scott Borchetta and Scooter Braun have now said that I'm not allowed to perform my old songs on television because they claim that would be re-recording my music before I'm allowed to next year. Additionally - and this isn't the way I had planned on telling you this news - Netflix has created a documentary about my life for the past few years. Scott and Scooter have declined the use of my older music or performance footage for this project, even though there is no mention of either of them or Big Machine Records anywhere in the film.
Scott Borchetta told my team that they'll
shut up. Or you'll be punished.
This is WRONG. Neither of these men had a hand in the writing of those songs. They did nothing to create the relationship I have with my fans. So this is where I'm asking for your help.
Please let Scott Borchetta and Scooter Braun know how you feel about this.
been able to resolve anything. Right now my performance at the AMA's, the Netflix documentary and any other recorded events I am planning to play until November of 2020 are a question mark. I love you guys and I thought you should know what's been going on.
6:35 PM · Nov 14, 2019 · Twitter for iPhone
242.1K Retweets 85.4K Quote Tweets 831K Likes

Photo 12.1

Happily, Swift was eventually able to re-record her works and release remasters of her old albums as "Taylor's Version." She has also signed a much more favorable deal with another label that allows her to keep ownership of her masters. Beyond record deals, Swift has also pressured streaming services to pay more to artists.

Things have changed. Musicians do not need to sign these kinds of contracts in order to get their music made and heard. **There are a host of tools for producing, distributing, and promoting music without a major label.** For *production*, in lieu of expensive studio time, there is lower-cost recording software. *Funding* does not have to come from a label; there are other options, including crowdfunding on Patreon, IndieGoGo, or Kickstarter. Digital *distribution* is different from physical distribution—there is no need to manufacture a CD and get it to a Tower Records store. The music just has to go online, and there are myriad alternatives for doing this. To get their music onto major streaming platforms, artists can use digital music aggregators who handle the business and accounting side in exchange for fees or a small portion of royalties. Or they can upload their songs directly onto platforms like SoundCloud and Bandcamp that offer a range of marketing and distribution services.

When it comes to *promotion*, labels and radio stations are no longer the kingmakers and gatekeepers. A viral TikTok video, successful social media campaign, or landing on a coveted playlist can allow an artist to reach millions of listeners and even top the charts without a recording contract. Popularity online translates not only into streaming income but also audiences for live shows and even record deals. As mentioned earlier, artists such as Lorde, Billie Eilish, Chance the Rapper, Post Malone, Lil Nas X, and Megan Thee Stallion

all got their start on platforms such as SoundCloud, TikTok, and Instagram. Others are following in their footsteps.

All of this has had a democratizing effect. None of these approaches guarantees a career; far from it. But artists now have many paths for getting their music out there and connecting with fans, all while keeping their copyrights and more of their royalties. Media and technology analyst Mark Mulligan writes: "Artists have never been so empowered and so educated. Nor have they ever had so many commercial options."

Acts that would have been ignored by the traditional industry now have a chance at success. Dave Bayley from the UK band Glass Animals told the *Guardian*, "Streaming has definitely leveled the playing field…It has allowed this tiny band from Oxford—us—to be given the same opportunity as Drake." The market share of artists who are sidestepping major labels and self-releasing their music has been on the rise. Spotify reports: "In 2025, more than a third of artists generating $10K or more in royalties from Spotify were DIY or started their careers as DIY (meaning they self-release their music through independent distributors)."

There are tradeoffs to the independent route, however. DIY distribution is risky and, even with the available resources, a distraction from the creative enterprise. And major labels still have specialized resources, relationships, and promotional capabilities that can boost an artist's career and earnings, including through playlist placement and international promotion. Artists signed to major labels tend to dominate many of Spotify's influential playlists, although independent artists have been able to gain visibility through its "Fresh Finds" suite of playlists.

The profusion of options for artists may be shifting the balance of power. Some creators—including superstars such as Taylor Swift who have negotiating leverage, and artists who already have a fan base from social media—are getting better deals from labels that allow them to own their masters and share a larger percentage of profits. They are getting those deals because they have already proven their earning potential, but perhaps they will open the door for aspiring musicians to benefit from more equitable arrangements.

12.4 A CELESTIAL JUKEBOX

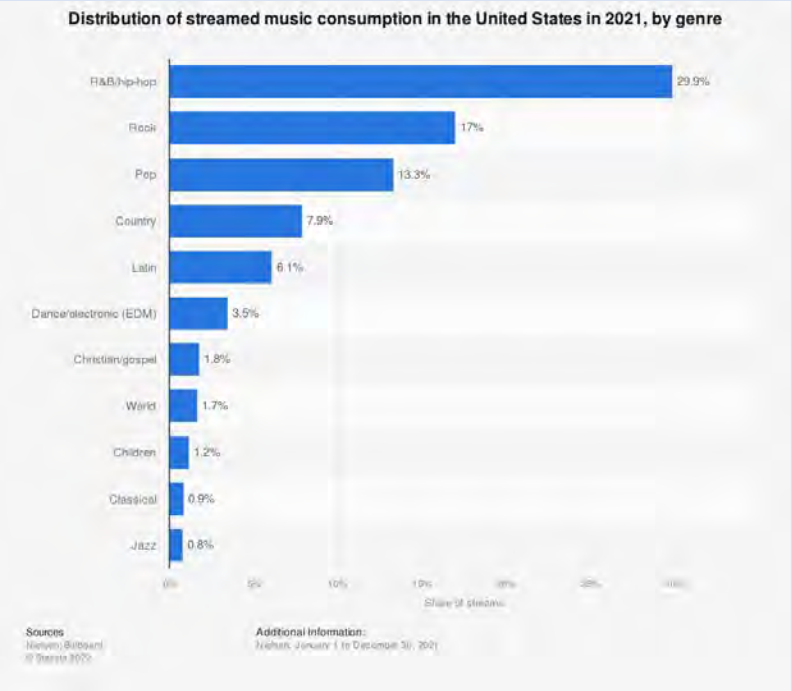
For fans, streaming services offer a greater quantity and variety of music than ever before. **The history of recorded music is at our fingertips.** It is a version of the "celestial jukebox" envisioned by scholars in the early days of the web. To help appreciate just how amazing this is, consider this scene from Edward Bellamy's 1888 novel *Looking Backward: 2000–1887*. The narrator is a man from 1887 who wakes up in 2000 to find a Utopian future. For him, music was "half of life." He is invited into a room to hear the music of 2000. He assumes that his hostess is going to sing or play it for him. But instead she "touched one or two screws, and at once the room was filled with the music of a grand organ anthem." What's more, she could choose between four different live concerts. (While in 1888 Bellamy was able to imagine something like radio, his musical Utopia did not have the equivalent of sound recording technology.)

The narrator is enthralled not only by the programming on tap but at the prospect of unlimited options. He muses: "if we could have devised an arrangement for providing everybody with music in their homes, perfect in quality, unlimited in quantity, suited to every mood, and beginning and ceasing at will, *we should have considered the limit of human felicity already attained*, and ceased to strive for further improvements." If only!

It may not reach the limits of human felicity, but today for $12.99 per month you get access to over 100 million tracks on Spotify. For a music fan from the 1990s, this all-you-can-eat buffet for a fraction of the price of a CD would have been a pipe dream. As Garrett Levin writes, with the removal of practical limitations on shelf space in a record store or air-time on the radio, "[f]ans are listening to more music more often than at any time in recorded music history."[62]

What have people been listening to?

Streaming has been a boon for some genres, including hip hop, EDM, and Latin music. Here is a chart from *Statista* showing the distribution of streamed music by genre in 2021, based on data from Nielsen's Year-End Music U.S. Report.



Streaming also favors "catalog" music—this is what the industry calls music that was released more than 18 months before the listener buys or streams it, as opposed to "current" music. Catalog music accounts for over 70% of streaming, prompting music companies to treat older recordings as actively managed assets—getting them onto playlists, running TikTok campaigns, licensing them for films and TV shows, and issuing new editions.

[62] Garrett Levin, "How We Discover Music In 2021," *Medium* (2021).

Streaming services and social media are serving not only a delivery but also a promotional and curatorial function, replacing the old gatekeepers. They have overtaken previous methods of discovering music such as radio, critics, and word of mouth, and their music curation is increasingly powered by AI—discussed at the end of this chapter.

In particular, Spotify's playlists became a significant force in music discovery. Among the most popular have been Today's Top Hits, RapCaviar, and ¡Viva Latino!. Getting onto one of these lists can make an artist's career. In 2018 economists Luis Aguiar and Joel Waldfogel estimated: "Being added to Today's Top Hits, a list with 18.5 million followers during the sample period, raises streams by almost 20 million and is worth between $116,000 and $163,000." *Vox* wrote: "RapCaviar shapes the sound of hip-hop, and can turn indie rappers into household names."

How were Spotify's playlists generated? Figure 12.2 provides a summary of how things functioned earlier in their development, which set the stage for how music is discovered today.

SPOTIFY
PLAYLIST GENERATION
EDITORIAL PLAYLIST
What is it? The editorial playlists are those playlists that are created by Spotify editors. Artists and labels can "pitch" an unreleased song.
What is an example? Today's Top Hits, Top 50 Global.
COLLABORATIVE FILTERING
What is it?
Collaborative filtering makes recommendations based on the similarities between a listener's selection in music rather than based on similarities in the music itself.
What is an example?
Listener A listened to Track 1, Track 2, and Track 3. Listener B listened to Track 1, Track 2, and Track 9. Collaborative Filtering will recommend "Track 9" to Listener A.
AUDIO FILE ANALYSIS
What is it?
Audio File Analysis makes recommendations based on the similarities of the raw-audio data from compositions. Examples of the raw-data the algorithm analyzes are: bars, beats, duration of composition, tempo, key, mode, timbre, etc.
What is an example?
Song A is 1 minute in length, has a quick tempo and has a pop drop. Song B is 1 minute 30 seconds in length, has a quick tempo, and has a pop drop. Listener plays Song A. Song B will be the next song recommended.
Editorial
Algorithmic
Algorithmic
Algorithmic
NATURAL LANGUAGE PROCESSING (NLP)
What is it? NLP makes recommendations based on textual information found online about a song or artist. Recommendations are made based on the similarities between "top terms" and "cultural vectors."
What is an example? Song A is referenced in same article about Song B. Song A's weighted score based on the "top terms" is similar to Song B's weighted score. Listener plays Song A. Song B will be the next song recommended.
Figure 12.4

As you can see, the service featured both human-curated "editorial playlists" such as RapCaviar and machine-curated "personalized playlists" such as Discover Weekly. It also combined human and machine curation to make "algotorial" playlists—editorial playlists customized for individual listeners, as with Beast Mode workout soundtracks and Songs to Sing in the Car. Behind the personalization was Spotify's algorithm, which generated eerily

accurate predictions of one's tastes. Walt Hickey from the data journalism website *538* echoed many a listener when he wrote "Spotify Knows Me Better Than I Know Myself."

This algorithm predicted what you want to hear through sophisticated big data analysis techniques. Building on the illustration in Photo 12.2, here is a brief description of some of them. (Please note that it is vastly oversimplified and based on information predating Spotify's AI DJ and AI Playlist tools.) First, *collaborative filtering* aggregated listener data to identify similarities in taste and provides recommendations based on what people with similar preferences have streamed, analogous to how Amazon and Netflix generated recommendations based on what other customers have bought or watched. If you and I both listened to a lot of the same music, plus I also listened to Artist X, Spotify might recommend Artist X to you. But, as explained by Oskar Stål, Spotify's VP of Personalization, this process was "happening at scale—not just one-on-one, but thousands, millions of connections and preferences being considered instantaneously, and always updating. Every day, half a trillion events, whether they are searches, listens, or likes, take place on Spotify, powering and guiding our machine learning system."

Next, *audio file analysis* focused on the sound itself rather than listener activity. It rendered the sonic features of raw audio—timbre, pitch, tempo, key, mode, loudness, placement of the "drop," etc.—in spectrograms such as the one in Photo 12.2 and applied deep learning to serve up similar music to the listener. This approach helped to cue up songs that collaborative filtering would miss due to insufficient listener information.

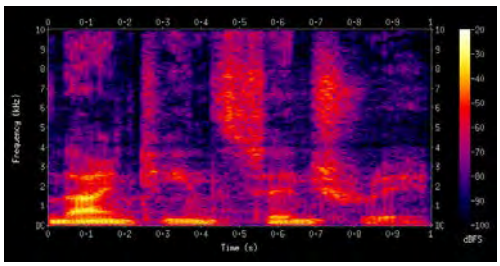


Photo 12.2

Finally *Natural Language Processing* (NLP) looked at textual clues. It scoured the internet for constantly changing terms and phrases about the song or artist, classified them into "top terms" and "cultural vectors," assigned weights to them indicating their importance in describing the music, and identified similar songs.[63] Photo 12.3 gives early NLP scores for references to the Swedish band ABBA.

n2 Term	Score	np Term	Score	adj Term	Score
dancing queen	0.0707	dancing queen	0.0875	perky	0.8157
mamma mia	0.0622	mamma mia	0.0553	nonviolent	0.7178
disco era	0.0346	benny	0.0399	swedish	0.2991
winner takes	0.0307	chess	0.0390	international	0.2010
chance on	0.0297	its chorus	0.0389	inner	0.1776
swedish pop	0.0296	vous	0.0382	consistent	0.1508
my my	0.0290	the invitations	0.0377	bitter	0.0871
s enduring	0.0287	voulez	0.0377	classified	0.0735
and gimme	0.0280	something's	0.0374	junior	0.0664
enduring appeal	0.0280	priscilla	0.0369	produced	0.0616

Photo 12.3

[63] This is the process developed at The Echo Nest, the music intelligence company Spotify acquired in 2014, as described by its co-founder Brian Whitman.

These processes were powered by a mountain of data. In the analog world, purchasing a record or CD was a finite transaction. No one knew how often you listened to what song and when. With streaming, your data is constantly pumping into the system. **We now live in an information economy, and streaming provides a trove of it.**

Then and now, Spotify knows what you searched for, whether you skipped songs or saved them to a playlist, how often you listened to them, and for how long. It tracks your interactions with other listeners. It knows when you are listening and correlates that with other data such as the weather, day of the week, season. It also has demographic information about you from your account registration and IP address. This all provides a window into your specific moods and activities. In the 2021 article "All the Ways Spotify Tracks You—and How to Stop It," *Wired* magazine wrote:

> Everything you do in Spotify's web player and desktop and mobile apps is tracked. Every tap, song start, playlist listen, search, shuffle, and pause is logged. Spotify knows that you started playing Lizzo's "Truth Hurts" at 23:03, listened to it for one minute, then searched for "break up" and listened to the entire four hours and 52 minutes of the 'ANGRY BREAKUP PLAYLIST' without any pauses.

All of this data helps Spotify recommend just the song you need right now—maybe Taylor Swift's "We Are Never Ever Getting Back Together" or Ariana Grande's "Thank U, Next"? It also helps the service know when you are ready to refresh—Spotify's data indicated that listeners were most open to new music on Mondays; hence the successful timing of Monday's Discover Weekly playlist. And listener data helps the service model where your tastes might go from here. Using a dataset of 100,000 listeners from 2016 to 2020, Spotify's researchers mapped how people migrate from liking one genre to the next. Perhaps it is not surprising that "to go from classical to any music genre from the 20th century, our model suggests users go through late romantic era, bridging the gap between centuries of music," but apparently it is also the case that "to go from EDM to nu jazz or gospel (among others), our model suggests users pass through tropical house, an upbeat/relaxed type of electronic music." Who knew?

Streaming services are not only data crunchers, however—as described by the music and technology newsletter *Water & Music*, they are also "data brokers." Like all of the data gathered by your devices, streaming data is used for targeted advertising. Spotify's advertising materials promised brands: "These real-time, personal insights go beyond demographics and device IDs alone to reveal our audience's moods, mindsets, tastes, and behaviors." "Real-time context ads" can be targeted based on what you are doing—Spotify offers advertisers categories such as chill, dinner, gaming, party, travel, cooking, focus, holidays, study, and workout. Customer data is useful for copyright owners too—this may be the kind of research the RIAA was referring to earlier when it mentioned supporting artists with "data insights"—streaming data might, for example, tell your band what cities to stop in during your next tour.

We think of AI and big data algorithms as starkly different, but in fact AI is merely the next step on this journey of intuiting taste from masses of data. In fact, one could have

predicted the current AI-curated music discovery services merely by studying their more linear, less stochastic, predecessors. So what happens when playlists—be they AI or algorithms—become our tastemakers? **How would we compare these new gatekeepers to the old ones?** In some ways, they are an improvement. More artists will break through and get heard by more people. The feedback loop that decides what you want to hear is more fine-tuned than the top-down curation in the days of radio, Nielsen ratings, and payola. The algorithm cuts through the blur of today's information overload and delivers just the right song for the moment—joy!

But there are still skews. Curation by playlist may have the effect of amplifying the popularity of trending songs as the algorithms replicate what happens to catch on. This can leave obscure or difficult songs by the wayside. Algorithmic curation may also favor "lean-back" music—where instead of affirmatively choosing songs the listener lets the provider cue the soundtrack for things like chores, working out, or studying—as opposed to "lean-forward" or "lean-in" music, where the audience actively selects what they want to hear. Critics of this trend have expressed concern that it turns music into "generic background noise," divorced from the artists who made it, making audiences less engaged with both the music and the musician.

If Spotify's playlists can make or break an artist or a song, this gives enormous power to a single gatekeeper whose choices may be driven by self-interest. Spotify's controversial Discovery Mode program—which was the subject of Congressional scrutiny—boosts playlist placement in exchange for the artist accepting a lower royalty rate. In the early days of radio, "payola" involved surreptitiously giving broadcasters money or other gifts in exchange for airplay. This practice was subsequently outlawed. Discovery Mode has been criticized as a modern form of payola because artists are exchanging lower royalties for greater exposure. Scholars have pointed out differences in "pay-to-playlist" and old-school payola, however. In *Pay-to-Playlist: The Commerce of Music Streaming*, Professors Christopher Buccafusco and Kristelia García argue that, unlike conventional payola made to radio DJs, "streaming pay-for-play paid to third parties, whether disclosed or not, likely causes little to no harm to consumers and may even help independent artists gain access to a broader audience." Today, in addition to new forms of pay-for-play, there are also other more nefarious ways to game the system through fake streams and listens. Streaming services and law enforcement authorities are trying to stop this kind of streaming fraud.

So far this chapter has included a lot of information about Spotify because of its market share and influence. From Spotify we now move to another major player in the streaming economy: **TikTok**. TikTok has been an increasingly influential force in the music industry, and its story so far has a lot to teach us about the evolving music ecosystem. Unlike Spotify or Apple Music, TikTok is not a music delivery service. It is a social media platform for sharing short videos, and it features a lot of non-musical content. But music is an important part of TikTok, often compressed into bite-sized morsels to fit the format. A portion of a song can serve as a soundtrack or a seed for other creators, sparking dance crazes, lip-syncs, sing-a-longs, and collaborations. When a song goes viral on TikTok, this can translate directly

into success on streaming services and even a deal with a major label. Calandra is taking note—while she waits for her music career to take off, she is posting soundbites to TikTok.

Figure 12.5 shows a sample of how music has been used on TikTok.

LIL NAS X

Creator Turned Grammy-Winning Recording Artist

In December 2018, Lil Nas X uploaded his song "Old Town Road" to TikTok and enabled its use by other creators. The song went viral with the help of the popular #yeehaw dance challenge where creators would drink "Yee Yee Juice" and reappear in cowboy clothes at the song's drop. In 2019 alone, it was streamed 2.5 billion times in the US and spent 19 consecutive weeks as U.S. #1 song. Lil Nas X went on to win two Grammys and has been nominated for many more. His rise demonstrates the power of TikTok in generating viral success.

FLEETWOOD MAC'S "DREAMS"

Retro Hit Finds New Audience

TikTok creator Nathan Apodaca created a video in September 2020 that depicted him skateboarding while drinking Ocean Spray cranberry juice, with Fleetwood Mac's hit "Dreams" serving as a soundtrack. The video went viral, garnering 86 million views (and counting!). As of October 2020 it had spawned over 134,000 tribute videos—even Mick Fleetwood and Stevie Nicks joined in on the fun. This led to career options for Apodaca and renewed interest in Fleetwood Mac, who saw daily streams of "Dreams" double and sales triple. The song also hit the Billboard Hot 100 for the first time since its original debut in 1977. Record labels are now introducing TikTok users to their artists' back catalogs and finding new audiences for classic hits.

RATATOUILLE: THE TIKTOK MUSICAL

A Collaboration Hits Broadway

TikTok user Em Jaccs made a TikTok video tribute in August 2020 to Remy the rat from *Ratatouille*, a Disney movie. This stems from a side of TikTok called "TheatreTok," where composers, singers, and actors collaborate on original, virtual musical numbers. Composer Daniel Mertzlufft took notice of Jaccs' song and wrote an arrangement and orchestration for "Ode to Remy." This led to other contributions, including original songs and set designs. This culminated in a virtual benefit performance, starring Broadway actors and raising money for the Actors Fund. What began as a TikTok trend resulted in over $500,000 for Broadway artists and staff laid off in the COVID-19 pandemic.

#SHANTYTOK

Sea Shanties: Proof Anything Can Go Viral

Thanks to TikTok's "duet" feature, which allows users to record audio and video next to other videos, sea shanties found a home on the app in January 2020. Shanties are old songs that were traditionally sung by sailors to coordinate their work on ships. They are easy to memorize and sing; vocal talent is a bonus but not necessary. The COVID-19 pandemic resulted in people craving human interaction amid isolation and boredom. Nathan Evans, the TikTok user who was credited with kicking off the trend with the shanty "Wellerman," signed a record deal following the explosion of this trend. Even quirky trends on TikTok can sometimes lead to viral fame and career options.

Figure 12.5

Remember John Philip Sousa's concern that sound recording technology would turn us into passive listeners rather than active creators? On TikTok, music can be *very* interactive, though not quite in the way Sousa envisioned.

But wait…how is all of this *legal*? What if the music in a TikTok video is unauthorized and falls outside the scope of fair use? Since TikTok is hosting videos uploaded by users, it falls within the ambit of the DMCA, so in order to qualify for the DMCA safe harbor it needs to remove videos containing infringing content.[64] As TikTok has grown, however, it has taken steps to license music directly for use on its platform. It has deals with the three major music companies and many other rights holders for the tracks in its general music library, where creators can go to find sounds for their videos. It also has a Commercial Music Library for businesses who use the platform.

In addition to the music licensed by TikTok, creators can also use original audio made by other TikTok users—just as so many people did with Lil Nas X's "Old Town Road"—potentially bringing the original viral success. The platform's Terms of Service enable this by specifying that while users retain copyright in the content they create, when they submit that content to TikTok, they grant other TikTok users a license to incorporate that content into derivative works. (Users also grant TikTok a broad license to use that content for its own purposes.) TikTok also has additional collaborative options such as the Duet feature mentioned in the Sea Shanties example above. Original creators can choose to let everyone, or just friends, make Duets with their videos—if Duet is enabled, new users can then post videos that will play alongside the original video.

Figure 12.6 is a timeline of TikTok's development and significant licensing agreements through early 2022. Since then, it has negotiated new licensing arrangements with rights holders. Outside of the copyright sphere, TikTok has also been the subject of national security concerns. In 2024, Congress passed a law that would ban TikTok in the United States unless its China-based parent company, ByteDance, sold it within a certain period. The constitutionality of this law was upheld by the Supreme Court in 2025, after which TikTok briefly went dark. This lasted less than a day and the platform was restored as executive orders delayed enforcement of the ban. In 2026 the company was restructured and the "TikTok U.S. Data Security Joint Venture" was established to comply with U.S. regulatory requirements. As a result, TikTok is still operational in the U.S. as of mid 2026.

[64] Note that not all unauthorized uses of copyrighted content in TikTok videos are infringing—some videos are protected by the fair use doctrine covered in Chapter Five, particularly if their use of music is highly transformative.

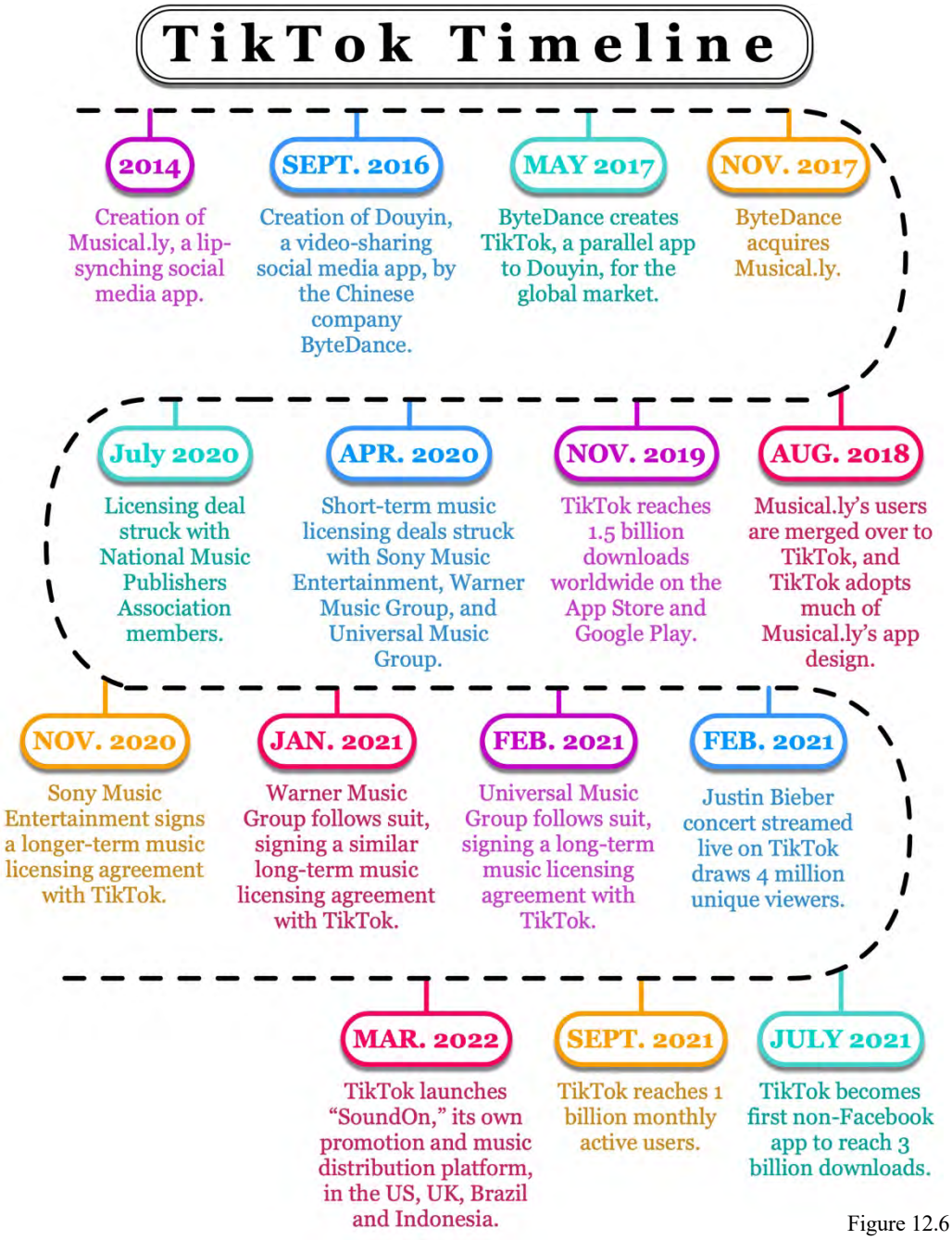

TikTok Timeline
2014
Creation of Musical.ly, a lip-synching social media app.
SEPT. 2016
Creation of Douyin, a video-sharing social media app, by the Chinese company ByteDance.
MAY 2017
ByteDance creates TikTok, a parallel app to Douyin, for the global market.
NOV. 2017
ByteDance acquires Musical.ly.
July 2020
Licensing deal struck with National Music Publishers Association members.
APR. 2020
Short-term music licensing deals struck with Sony Music Entertainment, Warner Music Group, and Universal Music Group.
NOV. 2019
TikTok reaches 1.5 billion downloads worldwide on the App Store and Google Play.
AUG. 2018
Musical.ly's users are merged over to TikTok, and TikTok adopts much of Musical.ly's app design.
NOV. 2020
Sony Music Entertainment signs a longer-term music licensing agreement with TikTok.
JAN. 2021
Warner Music Group follows suit, signing a similar long-term music licensing agreement with TikTok.
FEB. 2021
Universal Music Group follows suit, signing a long-term music licensing agreement with TikTok.
FEB. 2021
Justin Bieber concert streamed live on TikTok draws 4 million unique viewers.
MAR. 2022
TikTok launches "SoundOn," its own promotion and music distribution platform, in the US, UK, Brazil and Indonesia.
SEPT. 2021
TikTok reaches 1 billion monthly active users.
JULY 2021
TikTok becomes first non-Facebook app to reach 3 billion downloads.

Figure 12.6

At the moment, there is a potentially symbiotic relationship between the copyright owners and artists whose music is used on TikTok, TikTok creators, and the platform itself (Figure 12.7). Going viral on TikTok can launch new careers and rekindle interest in older artists' repertoires, as shown by the Lil Nas X and Fleetwood Mac stories. Traditional music companies are closely monitoring TikTok for talent—eager to sign artists who have already amassed a fan base—and pushing existing artists to use TikTok as a promotional tool. Here is an *optimistic* vision of the TikTok creative ecosystem.

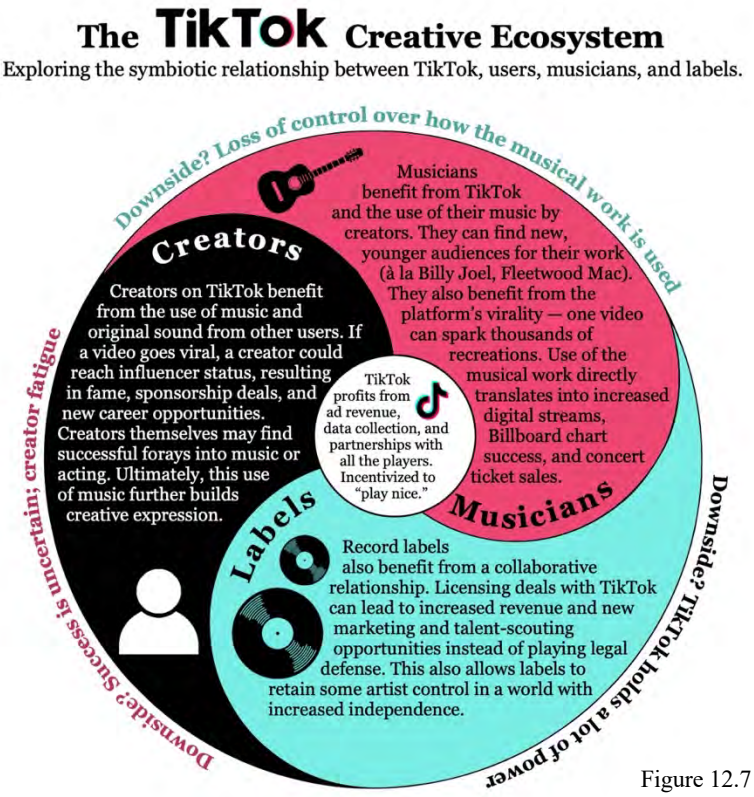

The TikTok Creative Ecosystem
Exploring the symbiotic relationship between TikTok, users, musicians, and labels.
Downside? Loss of control over how the musical work is used
Creators
Creators on TikTok benefit from the use of music and original sound from other users. If a video goes viral, a creator could reach influencer status, resulting in fame, sponsorship deals, and new career opportunities. Creators themselves may find successful forays into music or acting. Ultimately, this use of music further builds creative expression.
Musicians
Musicians benefit from TikTok and the use of their music by creators. They can find new, younger audiences for their work (à la Billy Joel, Fleetwood Mac). They also benefit from the platform's virality — one video can spark thousands of recreations. Use of the musical work directly translates into increased digital streams, Billboard chart success, and concert ticket sales.
TikTok profits from ad revenue, data collection, and partnerships with all the players. Incentivized to "play nice."
Labels
Record labels also benefit from a collaborative relationship. Licensing deals with TikTok can lead to increased revenue and new marketing and talent-scouting opportunities instead of playing legal defense. This also allows labels to retain some artist control in a world with increased independence.
Downside? Success is uncertain; creator fatigue
Downside? TikTok holds a lot of power

Figure 12.7

While it has been a boon for many musicians, TikTok has downsides too. One price of TikTok fame is fatigue. There is pressure to post new content constantly in order to stay relevant to followers, and success can be fleeting and uncertain. The artist L.Dre explained: "I'm at the whims of these almighty algorithms at all times. Like they pretty much decide, you know, whether I'm gonna eat dinner or whatever."[65] For creators who want to concentrate on their music, having to promote themselves on TikTok can be an unwelcome headache. On having to make a TikTok video to create "online buzz" for her band's new album, Florence Welch from Florence and the Machine called it the "sigh heard 'round the world." Photo 12.4 shows comments from FKA twigs and Halsey about their labels prioritizing TikTok trends over new music.

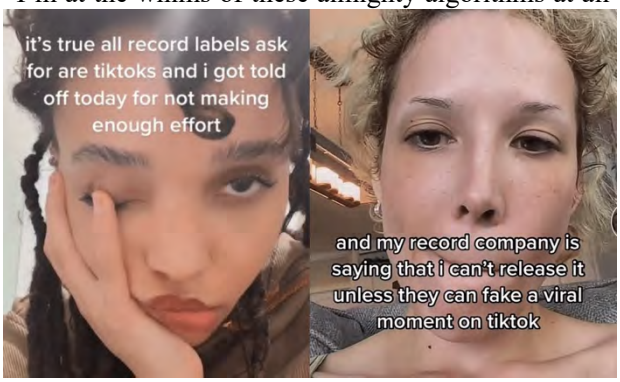

it's true all record labels ask for are tiktoks and i got told off today for not making enough effort
and my record company is saying that i can't release it unless they can fake a viral moment on tiktok

Photo 12.4

[65] TikTok's algorithm is behind its "For You" recommendations that, like Spotify's playlist generating algorithm, is tracking a massive amount of user data, and uncannily prescient about user preferences. One of my students told me if "For You" recommended a life partner, she would immediately say yes.

12.5 HOW ALL OF THIS SHAPES THE MUSIC…

The streaming era has not just changed how we find, enjoy, and interact with music—it has changed the music *itself.* On services such as Spotify, rights holders only get paid if a song has been streamed for at least thirty seconds. In order to keep the listener around, catchy parts are being frontloaded. The song gets right to the point. Contrast this with the dreamy languorous introductions from the songs in the Led Zeppelin case, from an era when choruses often materialized only after a lot of musical meandering. Now the first thirty seconds might contain a "pop overture," defined by music journalist and songwriter Charlie Harding as "a hint of the chorus in the first five to 10 seconds so that the hook is in your ear, hoping that you'll stick around till about 30 seconds in when the full chorus eventually comes in." Or they might feature a familiar sample or popular guest artist, on the theory that listeners are less likely to skip over things they have enjoyed before.

The standard verse-chorus structure that has long dominated popular music may be on its way out, giving way to a hook that comes at the beginning and then recurs to keep the listener tuned in for the whole song. (As you may recall, this common verse-chorus form was one of the unremarkable similarities claimed in the Michael Bolton case.) Nate Sloan and Charlie Harding explain: "From Spotify to TikTok, the goal is to create music that will grab a listener's attention from beginning to end…to keep streaming consumers engaged, it is increasingly common for songs to begin in medias res—with a hook, followed by a hook and ending with another hook."

Songs are also getting shorter. As you read on the chart that began this chapter, with physical formats or downloads, owners received the same payment per album whether you listened to its songs 0 or 1,000 times. Now the incentives are to maximize the number of individual song streams in order to accumulate those fractions of a cent. If the average fan streams three hours of music a day, rights holders will make more money if the listener streams a higher number of shorter songs during that period. Shorter songs can also help to keep the listener around for the entire track, which improves the chances of getting onto playlists. As our attention spans are getting shorter, so are the songs that keep us engaged.[66] The sound of music is inching closer to TikTok, where short clips and up-front fodder have reached their apex.

These musical developments can be overstated, of course—not all songs are short and sweet or have a punchy, attention-grabbing opener. There is still experimentation and variety, particularly if you look outside of the top hits. But the economics of streaming have had an impact on the music produced by revenue-conscious creators. While such market forces can impose creative constraints, they can also be liberating—for example, by freeing songwriters from the strictures of the verse-chorus format. Harding and Sloan write: "The 2020s, as weird

[66] For producers focused on accolades, there is also an incentive to pack more of those short songs onto a single album. The is because when calculating *Billboard* chart rankings and RIAA certifications for gold, platinum, etc., the industry uses a formula that equates 1,500 streams of individual songs on an album with one old-school sale of that album. So the cumulative streams from having 17 instead of 12 songs on an album can inflate its *Billboard* ranking and give it a better chance of being certified.

as they already are, may cement the next great tectonic shift in pop music, offering new ways for artists to express themselves in negotiation with new technological and commercial pressures. We may lose the chorus as we knew it, but gain previously unimagined sounds that will score the decade to come."

12.6 FROM BORED APES TO SOUNDSCAPES

One of the themes of this book is the interaction of technology, law, incentives, economics, and aesthetics in shaping the world of music. As I have tried to show, that interaction is often an unpredictable one, especially when disruptive technologies are involved.

In Chapter Two you were introduced to one of the central puzzles behind intellectual property. The physical property we are familiar with—a sweater or a car—is both excludable and rival. I can lock you out of my car and only one of us can drive it at a time. Music – the intangible creation fixed in manuscripts or vinyl records or digital files – lacks both of those qualities, and over time has become increasingly removed from any physical substrate. How can musicians make a living from such a product? In the streaming era, how can they connect directly to their fans in a way that would support their craft? What if a single technology could solve both of these problems at once? When the first draft of this book was completed, in mid 2022, some in the music business thought that just such a technology had arrived: NFTs, such as the popular "Bored Ape" collectibles.[67]

NFTs are "non-fungible tokens" that can be bought and sold in the crypto-marketplace. They are uniquely linked to a digital or physical asset—for music, an NFT might point to a new album or album art, or to real-world items such as front-row seats at a show, backstage passes, or merchandise. At their height, NFTs were hailed as a boon for artists and fans alike. Selling NFTs would allow musicians to bypass the conventional music business and connect directly with listeners. By the same "token," fans could directly support creators they liked, instead of paying for a streaming subscription where little if any of their monthly fee made it to a favorite artist. But, as we will see, NFTs were speculative, in both senses of the word. Their rise and their subsequent fall can teach us a great deal about the challenges involved in finding a technological elixir to cure ills in the music market.

Unlike a dollar bill, which is "fungible" or interchangeable with another dollar bill, a *non-fungible* token is unique. Unlike an MP3 file, no two NFTs are the same. **This creates a new kind of *digital scarcity*** because artists can control the number of NFTs that are minted. When you buy that song or album NFT, what you own is the *token*, which functions like a receipt, not the music itself. The artist retains the music rights, and anyone else can still download or stream the album via other channels. The music is still out there, but the NFT is yours. You can then hold on to it or resell it in the marketplace for the going price. The non-rival, non-excludable public good has seemingly been made private, excludable, and rival.

[67] Bored Ape was a popular NFT collectible.

For a time, NFTs did seem to provide an attractive option for enterprising artists. A single NFT could bring in the same amount of money as thousands of streams. Because NFTs operated outside of the dominant marketplace, they had the potential not only to boost earnings but also to change the music that got produced—many NFT artists were making unusual and experimental music that was unlikely to get the nod from streaming playlists or traditional music companies. Again, incentives shape the music that we hear.

In the 2008 essay "1,000 True Fans," Kevin Kelly, the founding executive editor of *Wired* magazine, envisioned a world where new technologies would allow creators to make a living without a blockbuster hit or stardom, by letting them directly connect with a thousand "true fans." He defined these as fans "who will purchase anything and everything you produce…They will drive 200 miles to see you sing…They buy the t-shirt, and the mug, and the hat." If those fans spend an average of $100 a year supporting the artist, and the artist keeps that money, this adds up to $100,000 per year.

Kelly's vision did not come to pass, however. Instead of small, passionate fan communities, large social media platforms became the connection point between creators and fans. As described by Cal Newport in the *New Yorker* in 2022, "the social-media giants effectively rerouted these connections through a small number of hulking algorithmic hubs, around which the collective creative output on the Web now ebbs and flows." To be sure, there are vibrant crowdfunding and fan communities online, but not on the scale that Kelly imagined. At their peak, it seemed like NFTs might change things and help make "1,000 True Fans" a reality.

But that was before people became more aware of the boom-bust cycle in crypto-related investments. For several years, people had been pouring money and effort into anything backed by blockchain technologies. That included cryptocurrencies such as Bitcoin, but it also included NFTs. More and more people piled into the marketplace, at first intrigued and then fascinated by the outrageous returns that early adopters had received. FOMO – Fear Of Missing Out – replaced calmer market analysis. The demand seemed insatiable. It had all the marks of a classic market bubble…for the very good reason that it was. By September 2022, the overall NFT market had plummeted, with trading volume reportedly dropping 97 percent since its peak at the beginning of the year. While some crypto assets, such as Bitcoin, have staged recoveries, NFTs have not.

The NFT crash is now in the rearview mirror. Currently everyone is talking about generative AI, extolled—for better reasons—as the next transformative technology. That is the subject of the next section in this chapter. Even in failure, NFTs can still teach us valuable lessons, however. They were a fascinating attempt to offer a technologically-mediated way for artists to reach fans directly and make a living doing so. It is worth reiterating why NFTs seemed to have such potential—and perhaps why some still persist, though they are trading at dramatically reduced prices. Their proponents claimed that they could solve the problem of making money from a non-rival and non-excludable good, and could do so in a way that bypassed the thicket of existing licenses, rules, and powerful middlemen that make truly transformative developments in the music marketplace so hard to achieve. Yes, they

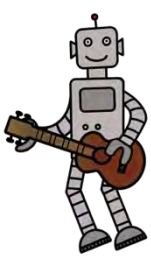
eventually collapsed, teaching us to be humble about confident predictions of technologically-mediated solutions. But in the process, they also brilliantly illuminated some of the barriers to innovation in the music business; the vacuum they tried to fill was a real one.

Like NFTs, the much-hyped Metaverse—the world of virtual reality—was celebrated as a way for fans to experience music and interact with artists, and for artists to make money. When COVID put touring and live music on hold, musicians had to explore alternatives. Enter livestreams and hybrid music-gaming experiences that brought in millions of viewers. On Fortnite, a giant avatar of Travis Scott set a record with 12.3 million live viewers, with the full five-concert series bringing in 27.7 million unique users. On Roblox, Lil Nas X's cowboy avatar attracted 33 million viewers. Virtual shows continued to attract audiences, both on and off of gaming platforms. In 2022 the band BTS streamed a concert for 2.4 million paying fans, and Megan Thee Stallion went on her "Enter the Hottieverse" virtual tour. The MIDiA research company estimated that by 2028, live-streamed concerts will generate from $4 billion to $5 billion annually.

ABBA, the Swedish band referenced earlier when we covered Spotify's Natural Language Processing analytics, managed to merge the virtual experience with the physical stage. At the band's "Voyage" show in London, the audience was in-person but the performers were not—the show was put on by computer-generated "Abbatars" of the band members, looking like they did in the 1970s. It got rave reviews. My fellow Duke professor Mark Goodacre told *The Guardian*: "You buy into it quite early on that it's actually ABBA there, although it's not just the band on stage…For me, the illusion never really dropped." Despite moments such as that, so far, outside of niche communities and gaming ecosystems, the musical Metaverse has not lived up to the hype. The projections of blockbuster growth and pervasive usage have turned out to be illusory. Even the company Meta itself has pivoted attention away from the Metaverse and toward the bright sunlit uplands of generative AI.

For a brief period, NFTs and the Metaverse seemed like they might be the next big thing. That moment has come and gone. The moral of this chapter is probably humility. To quote a line attributed to many people, including the physicist Niels Bohr and the baseball-playing *savant* Yogi Berra: "It's hard making predictions. Particularly about the future."

12.7 AMADEUS EX MACHINA?



A happy tunebot by Inés Jiménez (Photo 12.5)

As this book is being written, technology is once again transforming music. We are in the midst of rapid advances in generative AI, a technological disruption that may dwarf the tales of creative destruction we have covered so far. On the dire end of the spectrum, some are warning that, if things go wrong, AI could be an extinction event for humanity. But even if we escape doom at the hands of some malevolent "Skynet," AI will certainly change many aspects of your education and careers. With music, we are in for another set of seismic shifts for fans, artists,

businesses, and music. Compared to the streaming era, however, this cycle may be accelerated by the capabilities of AI.

How will AI change music? It is still too early to make detailed predictions, but whatever happens, the impacts will be far-reaching and multifaceted. Like sound recordings, radio, and streaming, AI will affect how music is discovered and experienced. Like file sharing, it will disrupt and reconfigure certain segments of the industry. And, like sampling, **AI will also change how music gets *made*, and by whom—or what** (Photo 12.5).

Xania Monet (Photo 12.6)

AI written music—performed by AI artists—is already topping the charts. In November 2025 the AI singer "Xania Monet" (Photo 12.6) topped *Billboard*'s R&B Digital Song Sales chart with the song "How Was I Supposed to Know?" Both the performer and song were produced by the poet Telisha ("Nikki") Jones, who wrote her own lyrics, then used AI to generate the accompanying music and performance. That same month another AI singer, "Breaking Rust," topped the Billboard Country Digital Song Sales chart with the AI-generated song "Walk My Walk." Jones used the AI model Suno for both the music and vocals of "How Was I Supposed to Know?" After importing her lyrics, she began with stylistic prompts such as "slow tempo," "R&B," "deep female soulful vocals," "light guitar," and "heavy drums," before refining the results through numerous regenerations.

Listen to the songs

Suno is currently the most popular AI music generator, followed by Udio in distant second. As of February 2026, Suno had over 100 million cumulative users, with two million paying subscribers and $300 million in annual recurring revenue. You may have used Suno or Udio for your own music. As with chat bots and image generators, these models offer the promise of producing the music you want to listen to, merely from text prompts. Users specify details such as genre, mood, vocals, instrumentation, arrangement, and production details, and the AI makes the music. This seems potentially revolutionary and, to many musicians, rather horrifying.

Generative AI models can produce human-sounding text, art, and music because they have been trained on human-created works. They work by ingesting vast amounts of data and learning from the patterns revealed in that data. And the datasets on which they have been trained contain vast amounts of copyrighted material. Just as ChatGPT and Claude learned from copyrighted books, articles, and websites, Suno and Udio learned from copyrighted recordings. The AI companies did not obtain permission from the rights holders of those recordings—they argue that doing so at this scale would have prevented the technology from developing as quickly as it has. There is currently a blizzard of over one hundred copyright lawsuits against AI companies, including several against Suno and Udio. **Once again, copyright law is at the center of a new technological transformation.**

For listeners, generative AI is increasingly central to music curation and discovery. Spotify offers its popular "AI DJ" along with AI playlists and a conversational AI assistant. YouTube's AI-powered "Ask Music" tool helps listeners find obscure recordings and live performances, and Amazon's "Maestro" creates playlists to match user prompts. Going forward, music will become **increasingly personalized**, taking into account not only preferences but also biometric and environmental data such as heart rate, weather, location, and time of day. Spotify's Daylist personalizes playlists by updating them throughout the day based on listener habits and other data. AI is not merely choosing the song you want to hear; it is customizing it—altering the lyrics and instrumentation for different activities or designing new, tailor-made audio to suit your needs.

For creators, AI promises to feature across multiple stages of the **songwriting and production** process. Suno and Udio do not just generate music from text prompts, they also serve as production platforms—today's digital audio workstations. AI can help artists get past writer's block and turbocharge musical composition. After experimenting with Google's Lyria model, musician Don Was told *The New Yorker*'s John Seabrook that "[h]is first thought was 'This is better than anything I could have done.' His second was 'I could collaborate with myself on my very best day.'" AI can write entire songs or just components of them—lyrics, stems, beats, melodies, backing tracks. It can unpack the features of audio files, allowing artists to engage in "Sampling 2.0": analyzing the components of a sample and extracting its underlying groove. Later in production, AI can handle sound engineering—mixing, mastering, tweaking. And when the song is finished, there are AI tools for distribution, marketing, or making music videos. AI can even perform a hit song in different languages in an AI replication of the original singer's voice.

On the plus side, all of this could have a **democratizing effect**, letting people create music without years of training or the money to pay for things like studio time and beat licenses. Making music will be faster and easier than ever. The AI music creator Oliver McCann acknowledged: "I can't sing, I can't play instruments, and I have no musical background at all." After one of his tracks amassed 3 million streams, he signed a contract with the independent record label Hallwood Media.

On the other hand, while AI will offer a welcome set of tools for many musicians, it could also disrupt livelihoods across the music business. **Generative AI was trained on millions of artists' works. Now it might supplant them.** Will the ability to make music with the push of a few buttons further displace income for songwriters already struggling to make a living, or session musicians who now fear being replaced by a tunebot?

It is important to note that our concerns go even deeper. **AI generated music arouses existential fears not only in musicians, but about *music*.** For thousands of years music has been one of the most fundamental ways that one human mind can touch another human mind. Humans have used music to express joy, pride, love, anger, a passionate need to dance, even the pain invoked by so many breakup songs. What happens when there is a machine "intelligence" in your phone or your earbuds that can generate that music on the fly for any mood? Will we come to see human makers of music like artisanal candle makers in the era

of electric light—able to command a niche audience, but fundamentally trivial in terms of their social impact? Or, on the contrary, will the proliferation of artificial music intensify demand for the authentic experience of music conveyed by one human to another? After all, ubiquitously available recorded music seems to have enlarged rather than constricted the market for live performances. Could the same be true here?

Right now, we can only guess what the eventual result may be. The magnitude is there, that is for sure. An estimated 100,000 new songs are being uploaded to streaming services every day. In July 2026 Deezer reported that the percentage of new music uploads that are entirely AI-generated on its platform had increased from approximately 10 percent in January 2025 to over 50 percent. So far, humans seem to be competing comparatively well. AI-generated songs comprised only between 1 and 3 percent of total streams on that platform. If most AI tracks never get listened to, it is not clear how much displacement would follow from the higher volume of AI-made music, unless streaming services have financial incentives to prioritize it. But these are early days. Will today's "Swifties" reminisce to their grandkids about the days when favorite artists were actually human? It seems a ridiculous thought and I would bet against it. Sousa thought the rise of recorded music would stop people singing and that certainly hasn't happened. Still, as mentioned earlier, if this book teaches you anything about the history of music it should teach you humility about predicting its future.

> The future is already here. It's just not very evenly distributed.
>
> -William Gibson

As with the other technological advances covered in this book, AI adds value, but in doing so, it will also alter the allocation of costs and benefits. It is worth comparing the recording industry's reaction to AI with its reaction to Napster, which it perceived simply as a threat. Yes, Napster was breaking the law, but in its wake the industry waited years to make available a cheap, convenient, and legal source for digital music. The streaming services you use filled that gap. What would have happened if the industry had not seen file-sharing networks merely as an existential threat? It is hard to say.

With AI, the reaction is different. Right from the beginning, the incumbents in the music business saw that AI presents both threats and opportunities. Perhaps Napster and its aftermath were instructive. Or perhaps they see AI as a chance to solidify their position and to pose a barrier to new entrants. Probably both. The CEO and chairman of Universal Music Group, Sir Lucian Grainge, told *The New Yorker*: "We have to be ready. Let's not be afraid. Let's just be prepared." Grainge's company collaborated with Google and its YouTube subsidiary in developing their early Lyria AI model. YouTube's "Music AI Incubator" invited artists and producers to test the technology and provide feedback, and YouTube's "Dream Track" tool partnered with artists to generate short video soundtracks performed in their style and voice.

The **larger business partnerships** have come on the backend, after AI systems are developed. Ironically, they have often come in the form of lawsuits that lead eventually to licensing deals. In June 2024, the three major music labels sued Suno and Udio for training

their systems on copyrighted music without authorization. In 2025 Warner Music Group reached a deal with Suno, and Warner and Universal Music Group both reached a settlement with Udio. According to the settlement announcement from Suno and Warner, Suno will launch a new platform sometime in 2026 that uses only licensed content. Songs made on its free tier will no longer be downloadable and paid tier songs will have download limits. Artists would participate on an opt-in basis, share in the proceeds, and have control over how their voices, likenesses, and compositions are used in AI music generated on the platform. This arrangement may be a prototype for future partnerships and licensed AI models, and by the time you read this book, there will likely be additional licensing deals between music rights holders and AI providers.

Streaming services are also partnering with rights holders to address AI-generated music on their platforms. Spotify has announced efforts to "stamp out spam, impersonation, and deception in the age of AI" and is collaborating with the three major labels and others to "develop responsible AI products that empower the artists and songwriters they represent." It recently launched "Verified by Spotify" badges that appear next to human artists' names who meet "Spotify's criteria for authenticity and trust." It also has a deal with Universal for licensed AI remixes and covers of participating artists' songs. TikTok has a deal with Universal to "remove unauthorized AI-generated music from the platform, as well as tools to improve artist and songwriter attribution." YouTube is expanding Content ID's automated filtering approach to detect and label AI-generated content on the platform.

These collaborations—particularly the ones between the large content owners and technology companies, or the ones involving the large platforms—may present other concerns. Chapter Eleven discussed the way that the private Content ID system has effectively displaced copyright law as the regime governing material on YouTube, and how that can leave users without meaningful recourse when their content is erroneously removed. These problems could be extended into the AI realm, with companies such as YouTube and its partners, rather than the law, dictating what AI-generated material stays available online.

The copyright question that will be central for generative AI is the one raised earlier: **Is using copyrighted material to train AI copyright infringement?** As mentioned, AI systems "learn" by ingesting and analyzing copyrighted works. The copying here is different from the copying that was challenged in the substantial similarity and sampling lawsuits you read about earlier, where the claim was that one song improperly copied from another song. Here we are looking at copying, not to create a competing song, but as an intermediate step in building a technological tool. We are not comparing two songs to see if one is too close to the other; instead, the alleged act of infringement is a means to an end. The legality of this activity will likely turn on whether it is protected by the "fair use" doctrine discussed in Chapter Five.

In an analogous case, albeit one involving a different technology, Google was sued after it scanned millions of copyrighted books to build the Google Books search engine. On Google Books, users type in a search term – say, "generative AI" – and the search engine

displays short snippets from books where that term appears.[68] Copying the full text of books was necessary to make a comprehensive, searchable index. As with training AI, this copying was an intermediate step in creating a new technological tool. The court said that Google Books was a fair use. The project was not illegal just because the *process* of building it happened to entail copying. Among other things, Google Books was "highly transformative," transforming the expressive text within books into a search index. "Words" became "pointers." It had "significant public benefits," including helping people to efficiently find books that were "once buried in research library archives." Instead of harming authors' and publishers' markets, it benefited them by generating new audiences and revenue streams. It even opened new fields of study; making it possible to track how language evolves by seeing the frequency of use in publications over time.

Is teaching AI with copyrighted inputs the sort of "transformative" and socially valuable activity that has qualified as fair use in the past? OpenAI has argued that training AI systems is even more transformative than the scanning in Google Books, which did not change the "semantic content" of the underlying works, because AI systems are "learning *patterns* in their whole training corpus and then using those patterns to generate entirely novel media." Does training AI with unlicensed datasets interfere with legitimate markets of copyright holders, cutting against fair use? Copyright owners have argued that it directly supplants their market for licensing content for machine learning purposes, and that AI systems could also harm the market for their creative works by producing competing products.

Two early decisions involving large language models (LLMs) provide contrasting answers on these questions. One judge described teaching LLMs with copyrighted books as "quintessentially," "exceedingly," and "spectacularly" transformative: "The technology at issue was among the most transformative many of us will see in our lifetimes." He wrote: "Like any reader aspiring to be a writer, [the AI] trained upon works not to race ahead and replicate or supplant them — but to turn a hard corner and create something different. If this training process reasonably required making copies within the LLM or otherwise, those copies were engaged in a transformative use." He likened training AI systems to teaching children to write: "[The rights holders' complaint is no different than it would be if they complained that training schoolchildren to write well would result in an explosion of competing works. This is not the kind of competitive or creative displacement that concerns the Copyright Act."

The second judge took a different view: "When it comes to market effects, using books to teach children to write is not remotely like using books to create a product that a single individual could employ to generate countless competing works with a minuscule fraction of the time and creativity it would otherwise take." His default position was that feeding copyrighted works into AI systems was not fair use:

> Generative AI has the potential to flood the market with endless amounts of images, songs, articles, books, and more. People can prompt generative AI models to produce

[68] The limited "snippet view" is only for copyrighted books where Google does not have an agreement with the copyright holder. Often there is an agreement that lets Google show more from the book.

> these outputs using a tiny fraction of the time and creativity that would otherwise be required. So by training generative AI models with copyrighted works, companies are creating something that often will dramatically undermine the market for those works, and thus dramatically undermine the incentive for human beings to create things the old-fashioned way.

As of July 2026 the pending lawsuits against music AI companies include Sony Music's lawsuits against Suno and Udio, Universal's suit against Suno, and several other lawsuits against these companies filed by independent artists. The company Anthropic is also being sued for training their Claude model on copyrighted lyrics. Are Suno and Udio protected by fair use? The answer will depend on whether the decisionmakers align more with the first or the second perspective offered above.

It may also hinge on another part of copyright law mentioned toward the end of Chapter Eleven—the Digital Millennium Copyright Act's (DMCA) anti-circumvention rules. If AI models are trained with illegally obtained materials, there is less likely to be a fair use. Suno and Udio learned from music on YouTube, and the rights holders argue that stream ripping from YouTube violates the DMCA. Whether or not this is true turns on a highly technical question of whether YouTube's rolling cipher technology is considered an "access control" (something that prevents access to the video) or "copy control" (something that permits access but prevents copying of the video) within the scheme of the DMCA. If the cases do not settle, courts will have the opportunity to explore both this and the larger fair use question.

Moving from *inputs* to AI-generated *outputs*, if a model trains on a particular kind of music, its creations may resemble some of the songs it was fed. When might similar-sounding outputs be infringing? The analysis is complex and would depend not only on the dataset but how the technology functions. Questions abound. Who is creating the allegedly infringing work—the person entering the prompts, or the AI system? Can the elements of the new song be traced back to the plaintiff's song? If so, is there "substantial similarity" between the newly created and original music? Or are the similarities only the inevitable ones that would occur whenever a human songwriter chooses to write music within a particular genre or style—pop with a disco feel, for example.

A separate legal issue surrounding AI-created music involves **voice clones**. In April 2023 the anonymous TikTok user @ghostwriter977 released a song called "Heart on My Sleeve." It was written by Ghostwriter but performed by AI-cloned voices of Drake and The Weeknd. The "fake Drake" song went viral, getting millions of streams and views on TikTok, Spotify, Apple Music, and other platforms. Drake's label Universal Music Group had it removed from streaming services.

Was "Heart on My Sleeve" infringing? Ghostwriter wrote it independently, without copying from any Drake songs, so "Heart on My Sleeve" does not infringe Drake's © right, the composition copyright. Turning to the ℗ right, the copyright over the sound recording, while "Heart on My Sleeve" used AI to mimic Drake's voice, it did not use any "actual sounds" from Drake's recordings. As you learned in Chapter Nine, the copyright statute says it is legal to "imitate or simulate" the sounds in another recording. So there is no infringement

of the sound recording right either. The only infringement claim would be over the use of Drake songs as inputs to develop the AI voice model. As discussed earlier, this may or may not be fair use, depending on the circumstances. Ironically, the legal basis for Universal's takedowns apparently did not involve Drake at all. "Heart on My Sleeve" contains what appears to be a sample of the hip-hop producer Metro Boomin's tag "if young Metro don't trust you, I'm gon' shoot you," and this reportedly furnished the grounds for Universal's actions.

As AI voice models have proliferated, so has the popularity of using them to perform songs in the style of famous artists. Is this *legal*? As the "fake Drake" analysis shows, in order for there to be *copyright* infringement, training the AI would have to be deemed infringing. (This is because "Heart on My Sleeve" was independently created, not based on particular authentic Drake songs; if a Drake soundalike track imitated not only Drake's voice but one of his songs, then there could be an additional copyright violation.) Outside of copyright law, labels have also invoked something called "*rights of publicity*" to challenge the legality of AI voice clones. These are the rights that artists have to prevent unauthorized use of aspects of their identity such as their name, likeness, and voice. Think, for example, of a soundalike appearing in an advertisement to promote a product. (Whether the artist retains those rights depends on the particular contract between the artist and the label.)

In two famous cases the singers Bette Midler and Tom Waits brought successful lawsuits against the use of soundalikes in advertisements for Ford and Doritos, respectively. The companies had hired singers to impersonate Midler's and Waits' distinctive voices. Legally speaking, the use of a soundalike in another *song* is different from using the artist's voice in a *commercial*, however, and may not violate right of publicity laws. This is because copyright's sound recording right explicitly allows soundalike recordings that simulate another recording without using its "actual sounds." Copyright is a federal law while publicity rights come from state law, and the U.S. Constitution says that federal laws are "supreme." That means that if a federal and state law conflict, or if the state law enters into an area of law largely controlled by the federal system, then the state law would be unconstitutional.[69] It would be "preempted" by the federal law.

Several courts have held that copyright's provision permitting soundalikes therefore overrides conflicting state law right of publicity claims.[70] In addition, the First Amendment's protections of speech and expression might exempt some expressive works—such as a scathing parody of a particular song or artist—from liability under right of publicity law. It is possible that the United States Congress may eventually enact a federal right of publicity scheme to counter deep fakes, and this would outlaw voice clones at the federal level. As of July 2026, bills have been proposed but none have been made into law.

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[69] This rule comes from the Constitution's "Supremacy Clause." In the United States there are federal laws such as copyright that apply across the country and state laws that vary from state to state, such as laws that govern divorce, real estate, and contracts.

[70] See *Maloney v. T3 Media* (9th Cir. 2017), *In re Jackson* (2d Cir. 2020), and *Romantics v. Activision* (E.D. Mich. 2008).

Holly Herndon (Photo 12.7)

We have already discussed licensing arrangements that will authorize AI-generated music—including tracks using voice clones—on a broader scale. On an individual level, some artists have taken matters into their own hands. In 2021, Holly Herndon (Photo 12.7), an artist and composer with a PhD from Stanford's Center for Computer Research in Music and Acoustics, released an AI model of her voice called "Holly+." Users can upload a song and receive a version of it sung by her "digital twin." Herndon believes both that "[t]here should be some sort of sovereignty over one's own voice" and that allowing open, non-commercial use of her voice-double "increases the likelihood of the voice's prominence online, which in turn only contributes to the value of the original voice model itself."

In 2023 Grimes offered her own "Elf.Tech" AI tool. Users upload or sing audio into the app and get a version sung by Grimes' virtual voice. Elf.Tech will assist with distribution of the resulting recording, and if it is successful, the user and Grimes split master royalties 50/50. Grimes' manager Daouda Leonard told *Rolling Stone*: "She often says that creativity is a conversation with those who came before us and those who are going to come after us...And so the idea is that instead of her attempting to control what is a gift from the universe, she's like, 'Well, let me opensource that.'" As with fan fiction or TikTok remixes, this approach fosters creative interaction between fans and artists.

In the future, the creative "conversation" with our predecessors and successors will increasingly involve the contributions of both humans and machines. Using machines to make music is nothing new, of course. Musicians have long used technology to create, from synthesizers to autotune to digital audio workstations. AI-crafted music is not a new phenomenon either. Professor David Cope was composing music with AI in the 1990s, including the pieces *Bach by Design* and *Classical Music Composed by Computer*. Taryn Southern released *I AM AI*, the "first album by a solo artist composed and produced with artificial intelligence," in 2018. She wrote the vocal melodies and lyrics, while a computer program created the notation and instrumentation. More recently the bands Mouse on Mars and YACHT released albums made with AI. (YACHT is short for "Young Americans Challenging High Technology," though as their website notes "we're neither young nor are we all American.") However, the future will bring us a *lot* more AI-generated music, and the tools at our disposal will have more creative capabilities.

Naruto
(Photo 12.8)

This raises another intriguing copyright question. What happens when a machine creates music? Can it own a copyright? In the US the answer is a firm no, at least today. In a case involving the monkey selfie in Photo 12.8, the court said that **only *humans* can be "authors" eligible for copyright ownership**. Naruto, the photo-snapping macaques monkey, did not qualify. An appeals court later confirmed that fully AI-generated material cannot be copyrighted because human

authorship is a prerequisite for copyright ownership. The next human Bard may get a copyright, but not 1,000 monkeys who serendipitously create Shakespeare on a typewriter.

As a policy matter, some have argued that we should not give copyrights to works made by AI because copyrighting them would devalue the work of human creators. Others have argued that the reverse will happen: if works by AI are uncopyrighted, their prices will fall and they may crowd out their manmade counterparts. They draw an analogy to the time when the US denied copyrights to foreign authors and cheaper works from abroad ended up outselling domestic works.

What if a work is the product of both human and machine creativity, as will often be the case? In March 2023, the United States Copyright Office issued preliminary guidelines on the copyrightability of such creations.[71] The answer, naturally, "will depend on the circumstances, particularly how the AI tool operates and how it was used to create the final work." The guidelines explain that if someone merely provides an instructional prompt and the AI produces "complex written, visual, or musical works in response," the resulting work is not copyrightable. By contrast, if "the traditional elements of authorship" emanate from the person and the AI is merely "an assisting instrument," the result is copyrightable.

With hybrid creations—for example, if a person takes AI-generated art and arranges or modifies it in a creative way—copyright would only cover the human contributions, not the machine-generated aspects of the work. In a decision involving a comic book made of AI-produced images, the Copyright Office said that while the images themselves could not be copyrighted, the text written by the human author and the way she arranged the text and images was protectable.

We are still working out who owns what, if anything, with AI-generated music. Reality is inevitably more complex than the Copyright Office's general guidance. This is especially true when it comes to music, where – as you know – divvying up revenue among rights holders is already complicated, with each new technology adding to the rights-thicket. Even when we have the revenue streams mapped out, as with streaming, we often do not know who to send the money to because we lack definitive ownership information and standardized metadata.

Generative AI compounds the complexities. The humans behind AI-made music go beyond the person entering prompts or remixing stems. There are also the people who wrote the AI's computer programs and the music it was trained on. The programmers have copyrights in the computer code and the artists have copyrights in the seed music, and both may want a piece of the action if the AI output is successful. If an AI-produced song becomes a hit, what happens? If the "author" is a machine, who shares the proceeds? The people who built the AI system? The people who used it? The owners of the training data? No one? If there is incremental human authorship, how do we separate the human contributions from the uncopyrightable machine-generated components? Our copyright infrastructure was not

[71] The Copyright Office registers copyright claims and provides information about copyright law. It is not a court of law, and the guidelines and registration decisions discussed here do not have precedential effect or the force of law.

designed for this scenario. There is no template for ownership claims, much less a mechanism for allocating payment and credit.

Right now, the business practices that have developed often have little to do with the actual law. In the business environment, the assumption is generally that every piece of music has a rights holder *somewhere*, whether or not copyright law would say that was the case—as in the situation where the song is created entirely by AI. Sometimes the ownership claims are stipulated in the AI platform's terms of use even though, technically, if there is no copyright in the song, that claim would likely fail. The music AI company Boomy has stated in its terms of use that it owns the copyright to all music created with its service. Users were eligible for up to 80% of net revenue if a track became a hit and could also license tracks back from Boomy under certain conditions.

Sometimes revenue splits are spelled out in private contractual arrangements. Back in 2019, Endel and Warner Music Group entered a partnership where Warner distributed Endel's algorithmically-generated soundscapes for a 50/50 split. When Warner went to register copyright in the soundscapes, it asked Endel how to credit them and Endel decided to list its software developers. As a result, they were credited as songwriters for 600 tracks. If the validity of the Boomy or Warner/Endel copyright claims were tested in court, they might not hold up because of a lack of human authorship. In the case of copyright registrations such as those obtained by Warner/Endel, it is not clear whether the Copyright Office investigated this question.

These are just two examples; other models exist and more will develop. Given the complexity of the ownership and creativity claims involved, approaches may have to rely on metadata and long lists of credits if they are to certify all of the artists who eventually will share in payments, possibly even including those artists whose works originally trained the AI models.

Perhaps some sort of blanket licensing structure will evolve, just as it did with radio and the Music Modernization Act. AI advancements will outpace the existing legal framework, though, and in the interim we are likely to see piecemeal solutions in the form of private agreements such as the licensing deals discussed earlier. Technological solutions will play a role, too. There are multiple projects designed to ensure that only authorized works are used in AI training. One of these is Spawning, which seeks to build "the consent layer for AI." This kind of consent infrastructure would allow artists to opt-in or opt-out of having their works used for AI learning on the front end. On the back end, initiatives such as C2PA (short for the Coalition for Content Provenance and Authenticity) will provide reliable metadata that tracks the provenance of digital content, including who created it and whether and how AI was used.

Setting aside the legal and practical questions, machine authorship brings up a deeper philosophical question. This book began by celebrating what music means to us. **Without a human author, is music still music? Or has something about the art form fundamentally changed?** If you walk through your apartment you may see things that were once made by hand and are now made by machines—the coffee mug you drank from this morning, the chair

you sat in to drink it, the cozy slippers you were wearing. With these kinds of products, we have become accustomed to automation and have no difficulty still perceiving a human creator or designer behind the outputs. But when we move to art forms where the artistic choices *themselves* are being made by the machine something seems very different. Is it? If your morning playlist still warms your soul or inspires you to greet the day, does it matter if the songs were composed by a machine? Will human-generated music someday have a special status in the same way that handmade mugs or furniture are valued more highly than those produced by an assembly line?

The answer depends on the locus of meaning – whether we focus on the listener or the creator – as well as the type of music. Let's begin with the listener. If beauty is in the ear of the beholder, so long as the music moves you, maybe it does not matter whether there is a person on the other end. One obvious candidate for this category is the "lean-back" music popularized by streaming services. So long as it sounds good, the listener might not care how the music was made.

However, if what gives music its meaning is the person *making* it, the listener might feel differently. The AI alternative just isn't the same. Something is missing; there is an emptiness on the other end of the line. This category might include "lean-forward" music. It would certainly include music by artists with passionate fans who prize the connection with the artist. When Taylor Swift sings about love and heartbreak or insecurities and alienation, it matters to her fans that she has lived those experiences. She has had sleepless nights too. Her resilience is an inspiration. In the op-ed "Taylor Swift Has Rocked My Psychiatric Practice," Dr. Suzanne Garfinkle-Crowell writes about how Swift's music has helped her patients: "[Swift] says: Borrow my strength; embrace your pain; make something beautiful with it — and then you can shake it off." Could a robot's song about Karma ever carry the same significance as "Taylor's version"?

According to a 2026 study, 97% of listeners could not tell the difference between entirely AI-generated music and human-created music when presented with two AI songs and one non-AI song. With regard to AI-made music, another study conducted in 2025 reported either indifferent or negative feelings about it, especially when the music was entirely generated by AI or imitated a human artist's style or voice. Reactions to AI music trended particularly negative among members of Gen Z and Gen Alpha. However, it is not clear whether people's reactions in the *abstract*—"What do you think about AI-created music?"—will track their concrete reactions to particular AI-aided creations. The commercial success of at least a few AI-generated songs seems to indicate that the response to those two questions may not be the same.

The degree of human and AI involvement in music production will be varied. With hybrid creations, the human element may be vital to maintaining a link with fans, even if portions of the song were entirely machine-generated. If a person writes the lyrics, it might not matter whether the sonic bed is made by man or machine. The lyrics tell the story, and we are already familiar with compelling lyrics over premade samples and beats. Even if the entire song is written by AI, fans might engage with a human performer. It is commonplace

to associate songs with performers when they were written by other people; maybe the same would be true of AI creations. The human component could also be more attenuated and function like a brand. Perhaps even an AI-written song sung by Grimes' clone still has that Grimes cachet because it sounds like Grimes, has her blessing, and pays her royalties. It is immaterial that no human is playing the conventional role of an "author."

Shifting our lens from the audience to the creator, what if the *author* is the one who imbues art with meaning? What happens when the progenitor is a machine? This brings us all the way back to our discussion of authorship in Chapter One. There, we talked about how copyright's conception of the "author" is relatively recent, and how there is an inherent tension between the law's idea of originality and the fact that artists do not create out of thin air. AI's ability to create art further challenges copyright's vision of authorship. Are we more like machines—or are machines more like us—than we would like?

Both humans and AI create by deconstructing and mimicking prior works. With music, both extract and replicate patterns and rules of melody, harmony, structure. As Taryn Southern explained: "holding an AI accountable for stealing from copyrighted works would be very similar to holding a human accountable because they've grown up listening to The Beatles their entire lives and now write pop music."

In his lectures on David Cope's AI-generated music, Douglas Hofstadter, who wrote *Gödel, Escher, Bach*, asked:

> Is music a craft
> Or is it an art?
> Does it come from mere training
> or spring from the heart?
> Did the études of Chopin
> reveal his soul's mood?
> Or was Frédéric Chopin
> Just some slick "pattern dude"?

For me, the answer is "both." Music is both a craft and an art. We replicate patterns but also summon original meaning from deep within us. In a way, you could say that we train on "datasets," the music we have heard in our lives. Yet music also reflects our own idiosyncratic lived experience, our own aesthetic, our own musical DNA. To repeat a quotation from Oliver Sacks that began this book, music "has a unique power to express inner states or feelings." At its most powerful, music is a conversation between the creator and the listener, and there is something essentially human in that communication. But maybe I'm just being Romantic.

Hofstadter uses Chopin as an example. When I was in college, my beloved piano teacher embarked on a journey through Poland "in search of Chopin"—tracing the composer's Polish influences, visiting the places where he lived and composed. Chopin drew not only from Polish folk traditions but also from the likes of Bach, Mozart, and Schubert. He did not invent the étude, mazurka, or polonaise. But, at least for me as a piano nerd, Chopin was a genius. It is hard for me to imagine AI producing a piece as moving as the Ballade in G minor, though

maybe the technology will prove me wrong. Even if it does, the music will not be suffused with Chopin's life story, or my teacher's attempts to retrace his footsteps, or every time I tried and failed to play it and stayed up late listening to people who could. Meaning is not tethered to the composer or listener or confined to a moment in time; it is fluid and constructed through human experience. Perhaps this will remain true even if some of the interlocutors along the way are machines.

Onto our final question with generative AI: how will this technology change music itself? In its early days, AI appeared adept at producing formulaic or data-driven music, including personalized soundscapes, background music for podcasts or video games, and other ambient soundtracks. But it may also yield surprises and push the boundaries of human creativity. Producer and engineer Shawn Everett told *Pitchfork* about the unexpected result when he asked AI to riff on a chord progression in the style of Pink Floyd: "What was happening was so different, and was landing in locations that no human being would normally think of, but it still felt rooted in something familiar." In the same article film producer Peter Martin explained that "AI can create an entirely new rhythm that maybe a human couldn't have executed" and offered a synesthetic suggestion: "You can create an audio version of a visual concept: What does a tree sound like?"

SUMMARY

This is a fascinating time for the musical ecosystem, artists, and listeners alike. **The churn of technology, business, law, and creativity continues.** Winners and losers change. New drawbacks and opportunities appear and disappear. Already we can see the established institutions in the business redefining their roles. New "market entrants"—for example the companies developing new AI musical technologies—are already settling on and even entrenching interests of their own.

It is time to revisit the Musicland hypothetical from this book's Overture, and take stock of where we are now. We wanted music, lots of it. How are we supporting musical creativity, given all the technologies available today? Alongside more conventional revenue streams coming from direct consumer purchases—streaming subscriptions, concert tickets, renewed interest in buying vinyl records—there are also new forms of patronage. In lieu of Emperor Joseph II we have micro-patronage and investment options—from crowdsourcing to the brief rise and fall of NFTs. For artists, the line between amateurism and being a professional musician has blurred. Amateurs who become internet-famous can move into the major-label market. Somehow it is simultaneously both easier and harder to "make it."

Meanwhile music as an art form continues to evolve as culture is shaped and reshaped by market forces and technological change. Will songs keep getting shorter? What will the next generation's hit sound like? Streaming services are stacked with tracks specifically engineered to generate revenue—front-loaded with catchy hooks and designed to keep listeners interested long enough to trigger a royalty payment. But those same services also

feature completely idiosyncratic musical creations, built around a particular artist's vision – audience be damned. Ironically, those may attract the most passionate fan-support. (To be fair, there is also a vast amount of AI-generated slop, created in the hope that somehow one of the machine-generated songs will become a viral hit.) Technology can also enable communities of creators who respond, almost in real time, to each others' creative output. TikTok enables communal creativity in a way that Sousa and our Icelandic friends from Chapter One could never have imagined.

Despite all this disruption, I hope that this book has shown you some remarkably consistent themes. There are recurring **rhetorical patterns**. If you change the terminology slightly, the debates over how streaming revenue should be allocated echo those from before the 1909 Copyright Act, dealing with the disruptive technology of sound recording.

There are patterns of **economics and property**. Yes, music now exists in arrays of ones and zeros. But there are still markets premised on forms of excludability, turning "public goods" into "private goods" either by law or by technology or both. There is the digital rights management technology that requires you to pay a subscription fee or see an ad in order to listen to music or watch a livestream. That "exclusion" is different in form, but not function, from your exclusion from a piano roll or musical score unless you pay for it. Some of the forms of exclusion remain the same. Offline, there are old-fashioned live shows and merchandise that are physically excludable. But now some of these have migrated to the virtual world.

There are patterns in **political economy and market concentration**. The debates over the 1909 Copyright Act conjured up concerns about a monopolistic or oligopolistic market for music. Those same concerns are raised about the three major music companies and about YouTube. In the live music space, they were also raised about Live Nation and Ticketmaster. Ironically, the digital technology that was hailed as a way of diminishing bottlenecks and "disintermediating," allowing artists to communicate directly with audiences, has been used to create an oligopolistic market with only a handful of dominant major players.

There are patterns of **legal change…and legal dysfunction**. The accumulating kudzu of music licenses, each designed to respond to a different technological moment, is a nice example of the latter. Just as there were in the early days of other technological cycles, there are fresh copyright questions that have yet to be resolved. We will continue to see questions about who—if anyone—owns rights to AI-made music. More decisions will soon be handed down about the legality of training AI with copyrighted inputs.

And finally, there are trends that I, at least, find more heartening. There are **patterns of artistic energy**. Artists are still finding new ways to make music, connect with their fans, and develop their art. Let us hope that this pattern, at least, continues.

Turning to generative AI, this latest disruption will clearly bring changes to musical production, distribution, and consumption. But it will also raise questions about the meaning of music itself. Whatever happens, there are lessons to be learned from prior technological advances, from phonographs and radio to digital music delivery and the streaming era. Familiar themes will recur: reallocations of costs and benefits, incumbents versus

newcomers, doomsayers versus optimists, and another reconfiguration of the music ecosystem. My guess is that the availability of **AI-generated music will elevate the value of the human touch**—whether it is part of the composition itself, a performance, or an endorsement. This all assumes that a human touch is necessary, of course. For some people, it is sufficient that the music sounds good, or makes you dance, or makes you think. No humans necessary.

As the technology matures, artists and rights holders will have to decide whether to resist it and try to maintain the status quo, or find a way to adjust and even capitalize on it. Both Grimes and Holly Herndon found value in sharing their mechanical voice doubles. Elf.Tech lets Grimes virtually collaborate and engage with fans and receive a share of potential profits. Herndon cites to the idea that "the more prominent and visible/audible a work of art is, the more valuable the certified original becomes."[72] Not everyone will benefit, though. Many jobs will be replaced by AI. It is possible that generative AI will end up entrenching the dominance of existing companies that control *choke-points*—whether those take the form of legal rights, technological controls, "network effects," or simple market power.

As I have just mentioned, the broader legal disputes over generative AI are instructively reminiscent of the sound recording debates from 1906. Just as they did then, content owners argue that their existing rights over content should afford them control over something new. There it was sound recording technology. Here it is generative AI. Sound recordings were useless if there were no songs to record. AI models require enormous amounts of material – much of it copyrighted – for training. If the content companies win that battle—for example, if training an AI system is found to be copyright infringement rather than a fair use—that would give the rights holders power over the development of AI systems. AI training would not be able to proceed, or at least to proceed on the massive scale that has demonstrated AI's capability, without licensing deals.

In response, AI companies echo the player piano and graphophone representatives from so long ago. *They* are the ones bringing about a "marvelous change," and they are doing so without depriving rights holders of what they had before generative AI was introduced! In their view, the availability of a plausible fair use argument is the very thing that has allowed the technology to develop as far as it has. Without that breathing space, progress might have stalled and we would not have discovered generative AI's full potential. The AI companies might also note that this is a familiar pattern in the story of copyright's interaction with new technologies. In many past cases—including with sound recordings, radio, and the VCR—there was at first considerable uncertainty about how copyright would apply to the new technology, and innovation was able to proceed before the law got involved rather than being vetoed or controlled from the start.

In 1909, Congress was asked to create a mechanical reproduction right that would have allowed the creation of exclusive deals between copyright owners and technology companies. Attentive to the danger of monopolies, it refused, at least in part. Instead, Congress enacted the compulsory license you have learned about, giving neither side all of what they wanted,

[72] As Herndon explains, this is the "My Collectable Ass" principle from theorist McKenzie Wark.

but preventing the formation of a new mega musical monopoly. What will the courts and lawmakers do this time? The choices we make, including those about whether training AI is fair use, will shape the structure of the resulting market, including possible anticompetitive knock-on effects. In 1909, we realized that there was a "long game." Will we this time?

Our discussions so far have focused on markets, on law, on aesthetics, and on technology. Generative AI is the most recent technological revolution to change music. Like the disruptions before it, it is likely to change the economics and aesthetics of the music that we love. But to see the history of our music as merely a fight over economics or business models or technological platforms would be to miss a central component of the story. Music is a vital part of our culture. Like all other parts of that culture, it thus reflects struggles not merely about business models but about justice—about equal treatment and respect. With that in mind, we now turn to the story of a different cultural and social revolution: the quest for civil rights and racial equality.

The next chapter will focus on music, copyright, and racial justice. Not all musicians have been able to participate in the copyright system that you have learned about in this book. You have already read about some of the contractual provisions and practices that deprive artists of royalties and control over their works. Throughout our history, Black artists in particular were routinely deprived of the credit and compensation they deserved. The next chapter will tell that story and explain how it shaped the musical world you inhabit today.

13

Music, Copyright, Racial Justice

Inside This Chapter

13.1 "LINGUA FRANCA OF AMERICAN MUSIC" 362
13.2 STRUCTURAL BIASES IN THE LAW .. 365
13.3 EXPLOITATION AND APPROPRIATION 368
13.4 ARCHITECTS OF AMERICAN MUSIC 375
13.5 SEGREGATION 392
13.6 HARMONY 401

One of the themes in this book is the sheer complexity behind our system for incentivizing, producing, and distributing music. We have talked about law, economics, technologies, aesthetics, and the way that all of those interact. The music that you get with a single artistic patron, no mass market, a Romantic valorization of the genius composer, and distribution limited to sheet music and live performance is very different than the music you get in a mass market streaming economy, with algorithms predicting preferences and the complex thicket of rights and licensing we have today. This book has also explored the permanent tension in music between joyful cross-fertilization and inspiration and outright appropriation and theft. Yet all of this can seem a little abstract, almost inhuman. This chapter will try and show you that it is not, and that the lines we are exploring also affect—for good and ill—something much more fundamental, as a matter of history, of aesthetics, of credit, and of justice.

This is a chapter about the history of race and music in America, and about copyright and racial justice. When thinking about music and copyright, it is important to realize that not all creators have been able to benefit from the legal system. The history of America is a tale of the clash of ideals and injustice, often racial injustice, and the history of American music is no different.

It would be difficult to overstate the influence of Black artists on American music. Musicologist Susan McClary describes Black musical forms as "the most important tributary flowing into today's music" due to "the exceptional vitality, creativity, and power of musicians working within these idioms." Yet Black creators were routinely deprived of the opportunity to benefit from their work: because of legal formalities that disproportionately affected

marginalized creators, persistent discrimination within the music industry, and unfair practices that took advantage of artists of color. Many never received credit or compensation for their songs, and often their creations were simply stolen.

Scholars such as Professor Olufunmilayo Arewa and Professor Kevin J. Greene have made these points powerfully and persuasively in their extensive body of work on the subject. This chapter is indebted to their influential work—in particular, Professor Arewa's articles "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context," "Blues Lives: Promise and Perils of Musical Copyright," "A Musical Work Is A Set of Instructions," and "Writing Rights: Copyright's Visual Bias and African American Music," and Professor Greene's articles "Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection" and "Copynorms, Black Cultural Production, and the Debate over African-American Reparations."

The inequitable treatment of artists goes well beyond Black musicians. Artists of all backgrounds have been treated unfairly, due to unequal bargaining power, lack of legal representation, gender and class bias, and a host of other factors. The exploitative provisions found in typical recording contracts continue to deny artists of royalties and control over their music—something that affects everyone from unknown artists to Taylor Swift. You have read about some of these contractual provisions—and Swift's efforts to draw public attention to them—in other chapters. But the sheer scale of the disparity between what Black creators gave to American music, and the meager rewards and recognition they actually received, merits particular attention.

This chapter will shine a light on some of the Black artists who made American music what it is, from the enslaved people whose musical traditions were brought here by force, to 20th century musicians who interpolated those traditions into new forms such as blues and rock and roll—including Bessie Smith, Robert Johnson, Chuck Berry, and Little Richard. It will chronicle how they and other Black artists were excluded from copyright's rewards. You will see racist responses to Black musical influence, from concerns that listening to jazz would debase the white race, to segregationists' attempts to ban rock and roll. At the same time, you will see the ingenuity of Black artists and entrepreneurs in the face of a colossally unfair system, and the role of music as a force for justice and integration. The story is a complex one, not reducible to a tweet or a slogan. The ultimate message will be one of hope: that "the staff of music is long, but it bends toward harmony."

13.1 "LINGUA FRANCA OF AMERICAN MUSIC"

"The lingua franca of American music" is an aphorism coined by Dr. Steven Lewis. Writing on the Smithsonian Institution's website, Dr. Lewis explains:

> Describing the African-American influence on American music in all of its glory and variety is an intimidating—if not impossible—task. African-American influences are so fundamental to American music that there would be no American music without them…Their work songs, dance tunes, and religious music—and the syncopated, swung, remixed, rocked, and rapped music of their descendants—would

become the *lingua franca* of American music, eventually influencing Americans of all racial and ethnic backgrounds.

Name a genre—ragtime, blues, jazz, gospel, rhythm and blues, rock and roll, soul, funk, reggae, disco, all the way to the rap and hip hop discussed in Chapter Nine, and even EDM[73]—and you will find African roots.

THE PEOPLE WHO CAME TO THE U.S. ALL BROUGHT THEIR OWN MUSIC...FOR SOME OF THEM THE JOURNEY WAS A GREAT ADVENTURE INTO FREEDOM...AND THEIR MUSIC CARRIED MEMORIES OF THEIR HOME.
FOR OTHERS...
...THE JOURNEY WASN'T...
...A VOLUNTARY ONE!
SLAVES DIDN'T JUST BRING THEIR MUSICAL TRADITIONS, THEY BROUGHT MEMORIES OF HOW TO MAKE THEIR INSTRUMENTS... STRINGED INSTRUMENTS THAT USED A GOURD AS A SOUND BOX... THE AKONTING SPIKE LUTES FROM SENEGAL...COMBINED...THEY BECAME A CLASSICALLY AMERICAN INSTRUMENT, THE BANJO.

American music is a remix, a melting pot, blending European and Native American forms with the music brought to this country by people of African descent, including the slaves whose music is described going forward, and those who came to our country via the Caribbean and Latin America—recall from Chapter Nine how Jamaican-born DJ Kool Herc laid the groundwork for hip hop.

Slaves used music to communicate about their struggles and oppression, as well as to express resistance and hope. From their jubilees, sorrow songs, work songs, and field hollers

[73] Music historians trace EDM's origins to house music in Chicago and techno music in Detroit, and point out that many of the pioneers were gay Black men.

came African influences that would endure in American music. There were **instruments** that became the precursors to the banjo and drums. There were **rhythms** and **tones** that were different from those in Western traditions, including complex polyrhythms and syncopation, and "blue notes" that used pitches between the ones on the European-based scale. There were features such as **improvisation**, strong **percussive** components, the "**call and response**" form—where a leader calls out a line and the group responds, and **vocal effects** such as hums, moans, and falsetto. These elements can be found throughout American music. They appear in the blues, jazz, and rock and roll music that will be discussed later in this chapter. They are also present in hip hop, with numerous commentators characterizing sampling—the subject of Chapters Nine and Ten—as an extension of the traditions of musical dialogue and call-and-response. As described by DJ Grandmaster Flash: "That's what mixing two songs together felt like. A question and an answer. One song would ask, the next one would respond."

The music produced by slaves also went well beyond spirituals and work songs. Many accomplished violinists of the time were slaves, including **Solomon Northup**, who was kidnapped and sold into slavery, and authored the memoir *Twelve Years A Slave*. There were also composers such as **"Blind Tom" Wiggins**, whose music has recently been the subject of renewed attention.

"Blind Tom" Wiggins

"Blind Tom" Wiggins (1849–1908) (Photo 13.1) was a talented composer and pianist who was born into slavery. When he was an infant, his family was purchased by a pro-slavery lawyer named General James Neil Bethune. Wiggins' talent at the piano quickly became evident—he was able to replicate any song he heard in its entirety. Eventually he became one of the most sought-after pianists of his time, performing at the White House for President James Buchanan, and counting Mark Twain as one of his fans. These performances brought in an enormous amount of money, but most of it went to the Bethunes and to a concert promoter. Even after emancipation, Wiggins reportedly "remained essentially an indentured servant to Bethune."

Photo 13.1

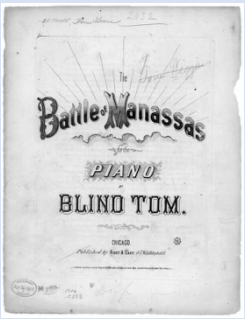


Photo 13.2

In addition to being a virtuoso performer, Wiggins was also a gifted composer, merging classical and popular styles from his era. One of his compositions is *The Battle of Manassas* (Photo 13.2), created by Wiggins when he was fourteen and titled after a victory by the Confederate army. Why would a person born into slavery commemorate a Confederate victory? Was Wiggins being subversive? In the *New York Times,* composer and scholar George Lewis wrote: "the work can be heard today as an anticipation of that regime's collapse—and as a soundtrack for the decommissioning of

Confederate statues, those physically imposing paeans to Jim Crow that merely posture as history."

Listen to pianist Jeremy Denk discuss the piece with Lewis, and perform it. Denk describes the piece as an example of "modernism way before its time," and like Professor Lewis, detects irony and protest within the music.

The music made by slaves left an indelible imprint on American music. They did not reap the rewards for this, however—not only did slaves not have ownership of the products of their intellectual and physical labor, they were *themselves* owned as "property." After emancipation, former slaves and their descendants were free. But because of continuing racism and inequality, African Americans continued to be subject to exploitation. In the music industry, African-American artists who pioneered and produced some of the most well-known American styles—ragtime, blues, jazz, R&B, and rock and roll—were deprived of the ability to control and profit from their work well into the 20th century. The next two sections will describe how this happened.

13.2 STRUCTURAL BIASES IN THE LAW

This section returns to our discussion of copyright law. On its face, copyright law is neutral—nothing explicitly treats authors differently on the basis of race, or ethnicity, gender, or class. But structural features within the law have had the effect of discriminating against African-American musical traditions. You have already learned about many of these features in this book. Here is a review of copyright's framework—as you read it, think about the kinds of music it might exclude from its purview.

As you learned in Chapter One, music copyright is rooted in a Western notion of **authorship**. The **originality** standard you read about in Chapter Four only confers copyright on works that are "independently created" by the author, as opposed to being derivative, or borrowed from somewhere else. Going forward, the author has the exclusive right to authorize or forbid future creators from making **derivative works** when there is "substantial similarity" of copyrightable expression. These notions reflect **aesthetics** associated with Romanticism. As discussed in this book, however, there is an inherent tension between the idea of Romantic authorship and the reality of how musical creativity happens: we do not create out of thin air, and music has always borrowed from the past, sometimes extensively.

Historically, copyright law also assumed that music came in **written form**, with sounds described through musical **notation**. Until as recently as 1978, musical compositions did not receive federal copyright protection unless they were written down in some way. "Fixing" them in a recording did not qualify.[74] To get a copyright, a song had to be "published" on sheet music with a copyright notice on it, or registered with the Copyright Office, which only

[74] Under the old law, until they were published, works were only covered by the "common law" copyright of different states.

accepted written "deposits" showing the music in question.[75] Remember the "Blurred Lines" and "Stairway to Heaven" cases from Chapters Seven and Eight? The songs "Got to Give It Up" and "Taurus" were copyrighted before 1978, and this is why their scope was defined by the manuscripts deposited with the Copyright Office. These rules changed in 1978, and now music can be fixed on both sheet music and recordings. Nevertheless, as discussed in Chapter Four, the fact that music comes in both written and aural form creates residual challenges—is music what you see on a page, or what you hear from a performance or recording? In later chapters, you encountered several court cases that focused on *visualizations* of music, including the score in *Newton* and the expert testimony in the subjects of our "deep dives." These cases showed how viewing music through a visual lens can be incomplete and misleading—minimizing the scope of Newton's composition and, with the deep dives, exaggerating or downplaying musical similarities.

The written/aural divide brings us to the way copyright **separates the activities of "composition" and "performance."** The © right over musical compositions has been around since 1831, and the separate ℗ sound recording copyright only went into effect in 1972. As you learned in Chapter Three, this was partly a (belated) response to new sound recording **technology**, as well as music industry **economics** and concerns about "record and tape piracy." But it also reflects a two-stage vision of creativity where music initially takes the form of a written composition covered by the primary © right, and then a performance derives from that composition, adding aural elements covered by the subsidiary ℗ right. It imagines a creative process where someone writes down a piece, and then musicians perform it, as opposed to all of the music that originates from the performance itself.

All of these assumptions—that originality means independent creation as opposed to copying, that there is a particular author or set of authors, that music is fixed in a static manuscript, and that composition and performance are separate and sequential acts—are out of step with how a lot of music is actually made. They exclude a whole range of communal, oral, and performance-based traditions, from Appalachian folksongs to the music of Indigenous peoples. And they had the effect of disadvantaging many Black musical forms.

This is because much, though certainly not all, great African-American music grew out of a different mode than the one presupposed by copyright law. Creativity was collective and fluid, coming from an oral tradition, emanating from performance, rather than the product of

[75] These formalities were relaxed in 1978 and removed in 1989. Historically, formalities were a double-edged sword. On the one hand, as discussed in this chapter, creators who were unfamiliar or unable to comply with them forfeited copyright protection. On the other hand, they provided information about copyright ownership that was necessary for people to legally use copyrighted material and pay the copyright holders. Today's technology has changed things, making formalities both less problematic and more useful. The internet allows for easier and cheaper compliance with formalities, minimizing their downside. At the same time, the upside of formalities—providing the data necessary for efficient use—has become more important than ever, given the unprecedented availability of creative material online. Currently, the lack of formalities means that there is no indication of whether all of this material is copyrighted, or who claims the rights. Scholars have argued that these collective developments weigh in favor of reintroducing formalities, in order to provide a record of copyright ownership that would enable, for example, the efficient sample clearance market discussed in Chapter Ten.

a "writing" produced by an "author." Music was something that was heard and experienced; a living tradition that could not be captured on paper. Originality and derivation were not in opposition to one another. The use of call and response and repetition in blues, of improvisation in jazz, or of sampling in hip hop contrast with copyright's limited vision of creativity. Returning to the subject of Chapter Nine, scholars have connected the law's harsh treatment of sampling in hip hop to its presumptions about originality and authorship. As mentioned earlier, the kind of creativity described here is by no means limited to music produced by African Americans. But it does feature prominently in many Black musical forms.

The oral tradition is important in African-American music both because of continuity with African oral traditions, and because of historical restraints on literacy, from laws prohibiting slaves from learning to read and write to educational deprivation. In the *New York Times* article "Why Is Everyone Always Stealing Black Music?" author Wesley Morris wrote: "Particular to black American music is the architecture to create a means by which singers and musicians can be completely free, free in the only way that would have been possible on a plantation: through art, through music— music no one 'composed' (because enslaved people were denied literacy), music born of feeling, of play, of exhaustion, of hope."

Not surprisingly, even if you tried to take a snapshot of this music and reduce it to written form, conventional notation would only provide a skeletal representation of it. This was true with slave music—the editors of *Slave Songs of the United States* (1867) struggled to notate slave music, explaining: "The best that we can do, however, with paper and types, or even with voices, will convey but a faint shadow of the original." Black music, as Morris describes it, "brims with call and response, layers of syncopation and this rougher element called 'noise,' unique sounds that arise from the particular hue and timbre of an instrument." Across Black musical forms, this "miracle of sound"—the complex rhythms, timbre, and tones such as the "blue notes" or flattened pitches discussed earlier—defy Western notation.

Black music was not confined to oral traditions, of course. In ragtime's heyday, there was a market for sheet music that people could play at home, so ragtime pieces were distributed in printed form. Back then, sound recording technology was in its infancy, and sheet music sales still dominated the market. In the early days of blues music, the great bluesman W.C. Handy not only published sheet music of his compositions, but started his own music publishing company called the Handy Brothers Music Company. Established in 1918, that company describes itself today as the "oldest family owned entertainment company in the United States." Jazz stars such as Louis Armstrong and Duke Ellington owned many copyrighted compositions, though the notated versions were often pared down "lead sheets." Many Black jazz artists could read written music, but they sometimes had to hide this capability because of pervasive racism. David Chevan describes in his dissertation "Written Music in Early Jazz" how musicians who could read notation would pretend otherwise, in order to "avoid breaking the white stereotype that blacks were too stupid to read music and that their musical ability was a wondrous gift and not the result of hard work."

Overall, however, **copyright's structural biases had the effect of denying or diminishing protection for the music made by Black Americans**. The combination of vibrant oral traditions, constraints on literacy, and the difficulty of reducing Black music to a single canonical form meant that a lot of this music was not written down. Under copyright's old rules, this deprived many Black musicians of copyright over their songs.

Even when their music *was* reduced to writing, notation was often an incomplete representation of the sound, narrowing the range of what was copyrighted. Because of the way copyright separated composition from performance, many features such as vocalization, timbre, tone, and rhythmic complexity tended to be omitted from the scope of the © composition right. Until the ℗ sound recording right went into effect in 1972, those features were unprotected by federal copyright law. Things are different today—most music is fixed in recorded rather than written form, and as you learned in Chapter Four the challenge is to figure out what aspects fall within the separate © and ℗ rights.

13.3 EXPLOITATION AND APPROPRIATION

Layered on top of the law's structural bias was the **widespread exploitation** of Black artists. While musicians of all races were exploited, systemic racism and pervasive inequality made it easier to take advantage of Black talent. **The history of American music is replete with stories of predatory business practices that deprived Black creators of credit and compensation for their work.** Sometimes their music was stolen outright; sometimes they were the victim of lopsided contracts and other unfair business practices. This section will cover some of the prominent forms of exploitation and appropriation that affected the Black artists who were instrumental in building styles from ragtime, blues, and jazz to R&B and rock and roll.

As explained previously, when copyright required music to be written down, many Black artists forfeited rights to their songs because the music was not reduced to writing. That music was then copyrighted by people who *did* write it down and claim rights over it, even though they did not create it. This is how folk collector Alan Lomax, who was mentioned in Chapter Ten, obtained copyright over "Rosie" and other songs that he collected but did not write. At least Lomax was partly motivated by the desire to preserve folk culture; others simply stole Black music to make a profit.

At the turn of the 20th century, the sound of the moment was ragtime, and the market for sheet music was booming. One of the most famous ragtime composers was Scott Joplin (Photo 13.3), who wrote over one hundred ragtime compositions. Joplin was successful in publishing his music, but he only received a fraction of the proceeds—for example he was not paid anything up front for his influential hit, the "Maple Leaf Rag," and earned only one cent per copy sold. Other artists, particularly those who did not transcribe their compositions, fared worse and were swindled out of both credit and payment. Music arrangers would convince Black ragtime artists to play original songs for them with

Scott Joplin (Photo 13.3)

the promise of publishing revenue or other rewards, only to abscond with those songs, notate them, and sell them as their own. The true composers remain anonymous and lost to history.

When sound recording equipment became more widely available in the early 20th century, talent scouts and promoters began traveling the South to record blues, country, folk, and other sounds that would become the backbone for a lot of American music. Some of the artists who were recorded eventually benefited from exposure and record deals. But others did not. Many Black blues musicians who sat for recording sessions were paid a pittance for their time, after which the people who recorded them took the songs and claimed the copyright for themselves.

Even when Black artists did form a relationship with music companies, they were frequently treated unfairly. Without negotiating leverage or legal representation, they would be enticed into signing bad **contracts**. Songwriters were often given cash or a car in exchange for handing over the copyrights to their music, which meant that they lost control over their work and did not receive ongoing royalties. "Work made for hire" clauses in those contracts made the music companies and their personnel the "authors" of the songs rather than the original creators. (As mentioned earlier, problematic provisions in recording contracts, including "work made for hire" clauses, persist today.) When they did receive royalties, Black artists were regularly underpaid for record sales, receiving less than their white counterparts. On top of lopsided contracts, Professors Matt Stahl and Olufunmilayo Arewa have documented "negligent and even fraudulent accounting practices" used against Black musicians. Later you will see how these kinds of business practices affected even famous and successful artists, who had to earn money through live performance rather than through copyrights and royalties.

In the early days of **radio**, Black artists also faced barriers to receiving royalties from radio play. In Chapter Three, you read about the performing rights organizations that collect and distribute performance fees from radio stations and other entities that publicly perform music. The first of these was ASCAP (the American Society of Authors, Composers and Publishers), founded in 1914. ASCAP initially refused membership to all but a few Black artists, depriving them of an important source of promotion and revenue. It was not just Black artists who were excluded; ASCAP also closed its doors to other artists it considered insufficiently "mainstream," including country and western artists. In 1939, the competing organization BMI (Broadcast Music Incorporated) was formed, and was able to benefit from ASCAP's mistake by welcoming talented writers from genres such as country, gospel, folk, jazz, and blues.

Related to the exploitation of Black musicians was the **appropriation** of their music through imitation. Perhaps the starkest example of appropriation was the shameful tradition of minstrel shows that began during the time of slavery, where white performers in blackface directly appropriated slaves' music, dance, and comedy, presenting their cultural traditions through a skewed lens of demeaning and misleading stereotypes. Eventually minstrel shows featured more Black performers, providing employment and allowing some performers to

achieve a measure of fame—but in order to do so they had to mimic a form that was already a demeaning mimicry of themselves.

In the 1950s, during the early days of rock and roll, it became common for music companies to produce white cover versions of music written or recorded by Black artists in order to make those songs more acceptable to the mainstream white audience—effectively putting a white face on Black art. At the time, segregation prevented many Black artists from reaching the audience their talent deserved. Often the white remakes outsold the Black originals. The next comic excerpt explores this phenomenon, beginning with Pat Boone's cover of Little Richard's "Tutti Frutti."

A-WOP BOP-A-LOO-MOP A-LOP BOM-BOM!!
TUTTI FRUTTI
OH-RUTTI
...AND NOW A SECOND ROUND OF BORROWING WENT ON. WHITE MUSICIANS WOULD RELEASE "CLEANED UP" VERSIONS OF BLACK HITS....
...ELVIS PRESLEY AND PAT BOONE RELEASED COVERS OF TUTTI FRUTTI.
PAT BOONE?!!
YES, AND HIS VERSION OUTSOLD THE ORIGINAL!
NOW THAT'S A TRAVESTY!
HE'S THE INNOVATOR AND THE ORIGINATOR. I'M THE IMITATOR!
PAT "DON'T STEP ON MY BLUE SUEDE SHOES" BOONE
"THE WHITE KIDS WOULD HAVE PAT BOONE UP ON THE DRESSER AND ME IN THE DRAWER 'CAUSE THEY LIKED MY VERSION BETTER."

BUT WHY ALL THESE COVER VERSIONS? WHY WOULDN'T PEOPLE JUST LISTEN TO THE ORIGINALS?
SEGREGATION AFFECTED CONCERT HALLS, RADIO STATIONS, RECORD STORES...AND LISTENING HABITS. THAT MEANT THERE WAS A PREMIUM ON HAVING WHITE ARTISTS.
PAT BOONE
LITTLE RICHARD
LET'S HEAR FROM SAM PHILLIPS, THE GUY WHO FIRST DISCOVERED AND PRODUCED ELVIS...
"IF I COULD FIND A WHITE MAN WHO SINGS WITH THE NEGRO FEEL, I'D MAKE A MILLION DOLLARS."
SO PEOPLE LIKE ELVIS JUST RIPPED OFF BLACK ARTISTS, TAKING THEIR TUNES AND "WHITE-WASHING" THEM?
SEGREGATION MEANT THAT A LOT OF BLACK ARTISTS COULDN'T REACH THE AUDIENCE THAT THEIR TALENT DESERVED. BUT THINGS WERE MORE COMPLEX THAN THAT.
LITTLE RICHARD SAID OF ELVIS: "HE WAS AN INTEGRATOR. ELVIS WAS A BLESSING. THEY WOULDN'T LET BLACK MUSIC THROUGH. HE OPENED THE DOOR FOR BLACK MUSIC..."
"HE BROKE THE ICE FOR ALL OF US."
THE REV. AL GREEN
DID PEOPLE REALLY SEE IT THAT WAY AT THE TIME?
SOME DID. HERE'S WHAT WALTER WHITE, EXECUTIVE SECRETARY OF THE NAACP, SAID ABOUT ROCK AND ROLL.
"[IT'S] A GREAT RACE LEVELER... A TREMENDOUS INSTRUMENT FOR BRINGING ABOUT A COMMON GROUND FOR INTEGRATION OF THE WHITE AND COLORED YOUTH."

The comic excerpt featured a famous quote from Sam Phillips, the founder of Sun Records, who was looking for a white performer who could imitate a Black sound and feel. Phillips found that person—along with the financial payoff—with Elvis Presley. Many of Elvis' hits were covers of songs originally written or performed by Black artists, including "All Shook Up" and "Don't Be Cruel" by Otis Blackwell, "That's All Right Mama" by

Arthur "Big Boy" Crudup, and "Hound Dog" recorded by Big Mama Thornton. This was clearly appropriation. But it is also part of a larger story that is more complex.[76]

The negative implications of Elvis's cover songs are clear: he overshadowed talented musicians who did not get their due, and he, Sam Phillips, and others profited when artists such as Blackwell, Crudup, and Thornton received far less. But at the same time, as you read in the comic illustration, people such as Little Richard and Reverend Al Green thought that Elvis helped to open the door for Black artists at a time when segregation was trying to keep it shut. Unlike others who expropriated Black music, Elvis gave credit to the Black traditions he borrowed, explaining in one quote how rock and roll was derived directly from rhythm and blues: "Rock and roll has been around for many years. It used to be called rhythm and blues." In another quote, Elvis said "If I had any ambition, it was to be as good as Arthur Crudup." And sometimes the borrowing was not a one-way street—the next illustration describes how "Hound Dog" was written by Jerry Leiber and Mike Stoller, two white songwriters who in turn revered and were influenced by Black artists.[77] None of this detracts from the massive underlying appropriation in Elvis's music; it merely adds other dimensions to the story.

[76] A recent article by Professor Robert Brauneis, "Copyright, Music, and Race: The Case of Mirror Cover Recordings," explores a case from 1950 called *Supreme Records v. Decca Records* that opened the door for "mirror cover" versions in which white performers directly imitated recordings originally made by Black performers, including their musical arrangement and style. That case was decided before there were federal rights over sound recordings, so the record company bringing the lawsuit did not have a ℗ copyright and had to pursue an unsuccessful "unfair competition" claim.

[77] Jerry Leiber and Mike Stoller both came from Jewish families and are part of a long tradition of Jewish songwriters who wrote canonical American songs including "God Bless America" and "White Christmas" (Irving Berlin), "Over the Rainbow" (Harold Arlen and Yip Harburg), "Summertime" (George and Ira Gershwin), and "A Fine Romance" (Jerome Kern and Dorothy Fields). To read more about this tradition, see David Lehman *A Fine Romance: Jewish Songwriters, American Songs* (2009), and for Leiber and Stoller's own story, see *Hound Dog: The Leiber & Stoller Autobiography* (2010).

SOMETIMES THE BORROWING WENT TWO WAYS. TAKE HOUND DOG. IT WAS WRITTEN BY JERRY LEIBER AND MIKE STOLLER, TWO WHITE SONG WRITERS WHO LOVED BLACK MUSIC...
HOUND DOG
THEY WROTE SO MANY GREAT SONGS!
THE MUSICIAN AND PRODUCER JOHNNY OTIS HAD ASKED THEM TO WRITE A SONG FOR BIG MAMA THORNTON.
AFTER MEETING HER, THEY WERE INSPIRED, AND WROTE HOUND DOG IN MINUTES. SHE RECORDED IT...
YOU AIN'T NOTHIN' BUT A HOUND DOG...
...AND THEN THAT SONG WAS COVERED BY ELVIS WHO MADE CHANGES TO BOTH THE TEMPO AND THE LYRICS...
SO THE SONG CROSSED BACK AND FORTH ACROSS THE COLOR LINE...
...CRYIN' ALL THE TIME...

In reality, even during the Jim Crow era, Black and white artists inspired and interacted with one another much more than segregated society wanted. As you will read later in this chapter, industry practices artificially separated music into racial categories, while creativity on the ground was more diverse and integrated. Borrowing and influence took many different forms, some of it within communities and traditions, some of it crossing back and forth across racial lines, some of it spanning genres and generations. This makes questions about

borrowing and appropriation complex because, as Professor Siva Vaidhyanathan writes, "tracing influence through something as organic and dynamic as American music is never simple."

This leads to the difficult question: **When is musical borrowing acceptable, and when does it shade into appropriation?** In previous chapters, we have looked at how the law tries to distinguish between licit and illicit copying. The answer depends in part on what was copied, and how much was used. Some material remains in the commons, open to all creators, while other material will meet the threshold requirements for copyright "ownership." But where do we draw this line ethically and aesthetically? Part of the analysis may echo the legal considerations just mentioned. For many musicians, creative reuse is considered acceptable, while rote or wholesale copying is not. Musical building blocks are freely shared, but taking more may require compensation. When distinguishing between permissible borrowing and appropriation, however, **issues of race, power, and privilege come into play**.

On one end of the spectrum, there is the borrowing that is a joyous act of cultural exchange, or a necessary part of creation—here copying from other artists is considered benign or even celebrated. Think of the sharing within the communal traditions discussed earlier. On the other end of the spectrum is the expropriation of cultural material from marginalized and disempowered groups by a dominant group that benefits financially and reputationally at their expense. The difference lies in the power disparity, something that was very much a part of the appropriation of Black music. And in the middle of the spectrum, there is a gray area about which reasonable minds can—and do—disagree.

In recent decades, there was progress toward redressing some of the exploitation discussed in this chapter. The rhythm and blues royalty reform movement in the late 1980s and early 1990s, led by singer-songwriter Ruth Brown and entertainment attorney Howell Begle, prompted companies such as Atlantic, MCA, and Capitol/EMI to increase the royalties paid to older rhythm and blues artists, and to forgive the "unrecouped" amounts under their contracts. Remember from earlier in this book that recording contracts often prevent artists from receiving royalties until they are "recouped" or have repaid all of the production costs for recording sessions, travel, and promotion. With many Black rhythm and blues musicians, the promised royalties were meager and production costs were inflated, meaning that they were systematically underpaid. Shady accounting practices compounded the problem. As they reached retirement age, even artists whose songs had been successful for decades were still not receiving royalties. The royalty reform movement helped some of these artists get paid, and also led to the formation of the Rhythm & Blues Foundation in 1988, which has provided financial assistance to hundreds of rhythm and blues artists in need.

Arthur "Big Boy" Crudup

Arthur Crudup and Dick Waterman (Photo 13.4 and Photo 13.5)

Some artists died before they finally got their due. Arthur "Big Boy" Crudup (1905–74) (Photo 13.4), mentioned earlier in this chapter, was denied royalties during his lifetime and died in poverty. His songs were covered by everyone from Elvis ("That's All Right", "My Baby Left Me" and "So Glad You're Mine"), to Creedence Clearwater Revival, Elton John, and Rod Stewart. When Crudup was still alive, blues promoter Dick Waterman (Photo 13.5) became friends with him and fought to get him the money he was owed. In 1972, Waterman was told that Crudup's publisher, Hill & Range, had agreed to repay him an initial $60,000.00, but when they went to the publisher's offices to sign the agreement, the company refused to sign the check. It was not until after Crudup died in 1974 that Warner Chappell acquired Hill & Range and pushed them to settle with Crudup's heirs for almost $250,000. Over the next three decades, Waterman estimates that Crudup's heirs received $3 million dollars in royalties, showing both the continuing value of Crudup's music, and just how much he was robbed of during his life. Waterman has lamented the fact that Crudup never got to see the earnings generated by his work and recalls: "He was a gentle and decent man. I am honored to have spent much time with him and my life is much the better for it."

To its credit, BMG Rights Management recently conducted an audit of contracts for catalogs going back to the 1960s that it had later acquired between 2008 and 2019. In December 2020 it reported the results, finding "significant disparities" in royalties, with less money going to Black than to non-Black artists, for four out of the thirty-three catalogs. BMG's CEO Hartwig Masuch encouraged other record companies to conduct similar reviews, saying: "Since before the dawn of rock 'n' roll, virtually all pop and rock music has its roots in Black music. Yet music's history books are littered with tales of discriminatory treatment of Black musicians. It is time for the music industry to address its past."

13.4 ARCHITECTS OF AMERICAN MUSIC

Countless Black artists were instrumental in building American musical traditions. Some of them became famous; many more remain anonymous or unacknowledged. This section will highlight only a few of the artists who shaped American music. To learn more about other influential musicians, look for relevant courses at your school, and read the excellent histories and biographies that have been written about them.

We begin with Bessie Smith, the "Empress of the Blues," one of many extraordinary Black women who, against the tide of both racism and sexism, made enduring contributions to American music. To hear a broader tribute to the "founding mothers" of American popular music, you can listen to the NPR series "Turning The Tables: Celebrating Eight Women Who Invented American Popular Music," which featured Bessie Smith, Billie Holiday, Maybelle

Carter, Marion Anderson, Ella Fitzgerald, Mary Lou Williams, Celia Cruz, and Sister Rosetta Tharpe, all of whom could belong on a "musical Mount Rushmore."

Bessie Smith (1894–1937) (Photo 13.6), the "Empress of the Blues," was born in Chattanooga, Tennessee in 1894, into extremely difficult circumstances. "The Civil War and slavery were not so far behind her; a racial segregation just short of official apartheid was all around her," wrote Carman Moore, a composer and the author of a biography about Smith. Both of her parents died when she was a child, and she grew up in poverty. She was raised by an older sister, and to earn money, she sang and danced with her brother on street corners. Her talent was clear from an early age, and by the time she was sixteen, she was on the road with the Rabbit Foot Minstrels, a variety show that included the famous blues artist Ma Rainey.

Bessie Smith (Photo 13.6)

Smith's recording career began in 1923, when she was signed to Columbia Records. Her first hit single was her rendition of "Downhearted Blues," a song written by two other African American women, Lovie Austin and Alberta Hunter. Smith also wrote songs herself, composing around a quarter of the songs she recorded, including "Young Woman's Blues" and "You've Been a Good Ole Wagon." When covering other's blues songs, Smith added her own signature interpretation. The clarinet player Mezz Mezzrow recalled: "She made up her own melody to fit the poetry of her story, phrasing all around the original tune if it wasn't just right."

Smith's life experience came through in her art. So did her personality—she had a fierce wit and was overt about love and sex. Her recordings addressed everything from societal issues such as racism, working class poverty, and incarceration, to relationships—unrequited love, infidelity, and female sexuality. Cultural anthropologist Maureen Mahon, the author of *Black Diamond Queens: African American Women and Rock and Roll*, wrote: "Smith sang about the everyday reality of wanting to live life to its fullest as a young, black, poor woman—a category of person that the mainstream of America ignored with impunity…. By singing about black lives with care and conviction, Smith and her sister classic blues women Ma Rainey, Alberta Hunter and Sippie Wallace advanced the revolutionary idea that black lives mattered—and specifically, that black *women's* lives mattered."

> Smith's voice was legendary. Here is how journalist Gwen Thompkins described it: None of the others could sing with her combination of field holler and Jazz Age sophistication. None could throw her voice from the stage—without a microphone—and make a balcony seat feel like the front row…In her phrasing, embellishments and even her breaths, she was communicating the kind of outward urgency and inner stillness that often signals the telling of an absolute truth.

Smith's style, and the content of her songs, inspired a long list of powerful female artists: Billie Holiday, Mahalia Jackson, Aretha Franklin, Big Mama Thornton, Janis Joplin, Queen

Latifah—who played Smith in the 2015 biopic *Bessie*—and even Beyoncé. Smith is credited not only with her influence on blues, but also for helping to lay the foundation for rock and roll.

Tragically, Smith died from a car accident in 1937, at only forty-three years old. She was buried in an unmarked grave—her estranged husband reportedly spent the money for the tombstone elsewhere. Decades later her grave finally received a headstone, funded in part by the singer Janis Joplin.

During her life, Smith made a great deal of money as an entertainer from her performances. However, the proceeds from her recordings and from the songs she wrote were a different story. Like other Black artists, she was subject to the unfair record deals discussed in this chapter. Even though she sold millions of records for Columbia, under the terms of her recording contract Columbia gave her no royalties for either her recordings or her compositions. Instead, she received a flat fee of no more than $200 per song, and only received a single payment of $125 or $150 for many of them. Columbia reportedly paid much larger sums and royalties to many of its white artists.[78]

The next comic excerpt introduces you to Robert Johnson (Photo 13.7), a blues musician who recorded in the 1930s. It begins with homages to his influence, and then shows how Johnson himself built on a rich musical "commons." In doing so, it illustrates the disconnect between collective, fluid traditions such as the blues, and the concept at the heart of copyright law of "owning" a single, "frozen" piece of music.

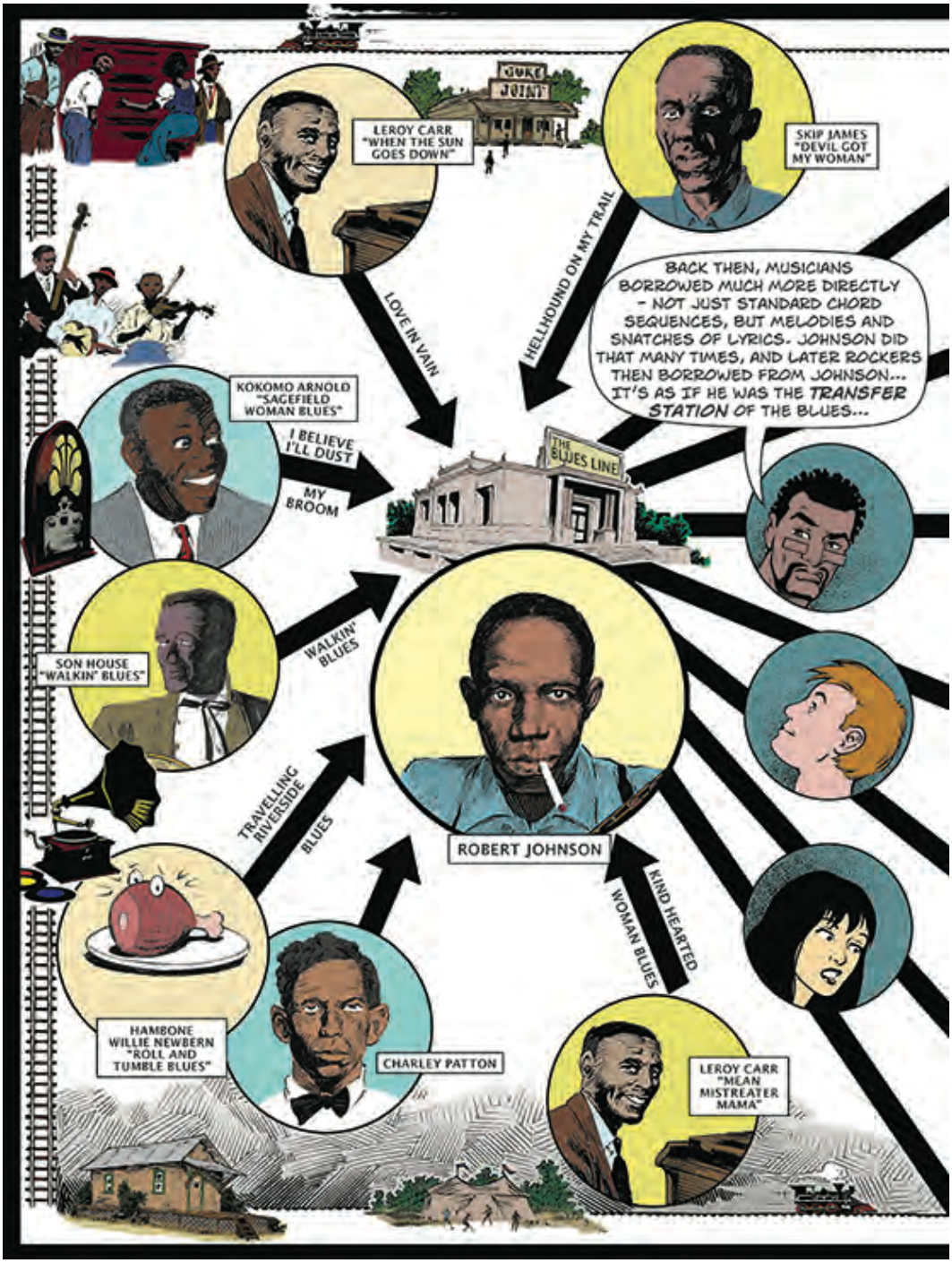
The cover of Robert Johnson's posthumously released box set (Photo 13.7)

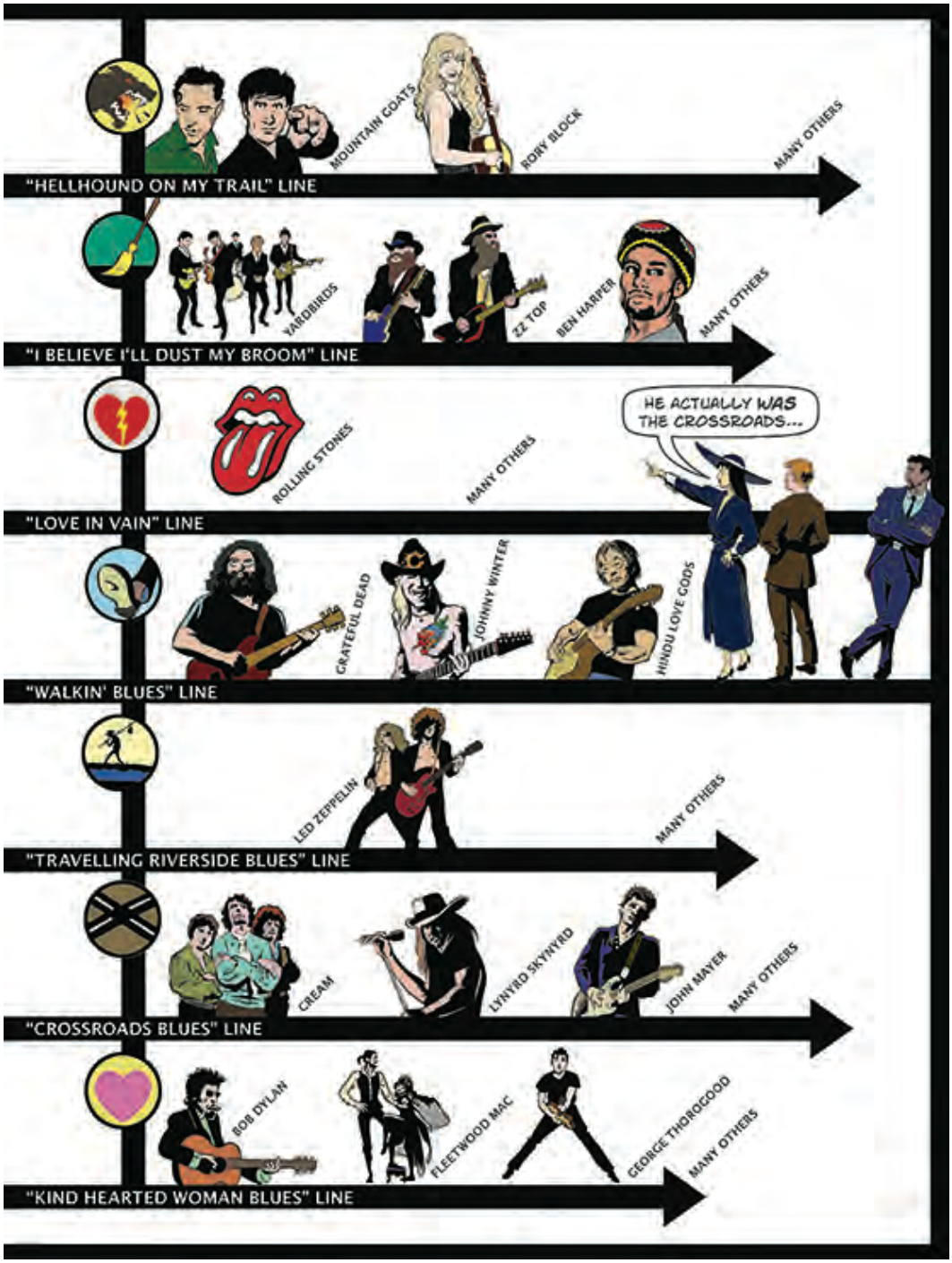
[78] These details come in part from a lawsuit filed in 1979 by the executor of her estranged husband, who was recently deceased, and their adopted son. They sued Columbia seeking redress for its unfair business dealings with Smith. The lawsuit was dismissed because it was filed too long after the alleged harms, and the "statute of limitations"—the time limit for filing a lawsuit after an event occurs—had passed. *Gee v. CBS, Inc*., 471 F. Supp. 600 (E.D. Pa. 1979).

ERIC CLAPTON
I THINK HE'S THE GREATEST FOLK BLUES GUITAR PLAYER, WRITER, AND SINGER THAT EVER LIVED.
ROBERT PLANT
A LOT OF ENGLISH MUSICIANS WERE VERY FIRED UP BY ROBERT JOHNSON, TO WHOM WE ALL OWE, MORE OR LESS, OUR VERY EXISTENCE, I GUESS.
ROBERT JOHNSON
HE WAS LIKE A COMET OR A METEOR THAT CAME ALONG, AND, BOOM, SUDDENLY HE RAISED THE ANTE, SUDDENLY YOU JUST HAD TO AIM THAT MUCH HIGHER....
ROBERT JOHNSON WAS ABLE TO PLAY GUITAR LIKE NOBODY ELSE HAS BEEN ABLE TO. NOBODY CAN FIGURE IT OUT. ALL THAT STUFF ABOUT HIM MAKING A DEAL WITH THE DEVIL MAY BE TRUE, BECAUSE NOBODY CAN PLAY THAT WAY.
KEITH RICHARDS
RAVI SHANKAR AND ROBERT JOHNSON ARE THE ONLY GUITAR PLAYERS I LISTEN TO.
GEORGE HARRISON
JOHN MELLENCAMP

THAT'S A STATUE OF BLUES MUSICIAN ROBERT JOHNSON, WHO HAD AN ENORMOUS INFLUENCE ON ROCK AND ROLL. JOHNSON WAS A GENIUS. BUT HE WAS ALSO TAKING A TRADITION THAT WAS ALREADY AT LEAST 30 OR 40 YEARS OLD...
...A COLLECTIVE TRADITION, ROOTED IN THE AFRICAN-AMERICAN COMMUNITY OF THE MISSISSIPPI DELTA...
I'LL PLAY YOU SOME CHORDS!
C
F
G
AND IN THE MELODY, I AM SUBSTITUTING THESE FLATTENED NOTES – CALLED BLUE NOTES...HEAR THAT SOUND?
NOW ALL THIS...THE STRUCTURE, THE CHORD SEQUENCE, THE LYRICAL PATTERN, WITH ITS REPETITION AND CALL AND RESPONSE...
ALL THAT IS TRADITIONAL... PART OF A MUSICAL COMMONS THAT EVERYONE CAN TAKE FROM...

SON HOUSE
BLIND LEMON JEFFERSON
MISSISSIPPI JOHN HURT
HOWLIN' WOLF
BIG MAMA THORNTON
CHARLEY PATTON
MEMPHIS MINNIE
SKIP JAMES
REVEREND GARY DAVIS
MUDDY WATERS
LIGHTNIN' HOPKINS
SLEEPY JOHN ESTES
LITTLE WALTER
IT IS AS IF WE DIPPED A GLASS INTO THE RICH WATERS OF THE DELTA* AND FOUND IT TEEMING WITH MUSICAL LIFE...
SPLASH
*THESE WERE NOT ALL DELTA BLUES MUSICIANS - SOME WERE FROM TEXAS, SOUTH CAROLINA, TENNESSEE - BUT YOU GET OUR POINT. -EDS.
BUT THEN WE WANT TO SAY "WHO OWNS THIS"? OR "WHOSE SONG IS THIS"?...
...AND TO DO THAT WE HAVE TO FREEZE WHAT'S THERE... SEPARATE IT FROM WHAT'S GONE BEFORE...
FREEZE
TOSS
AND DOING THAT JUST CHANGES THE NATURE OF THE MUSIC.
ONE LUMP OF THE BLUES, SIR, OR TWO?
I'LL TAKE ALL YOU HAVE...


JUKE JOINT
LEROY CARR "WHEN THE SUN GOES DOWN"
SKIP JAMES "DEVIL GOT MY WOMAN"
HELLHOUND ON MY TRAIL
LOVE IN VAIN
BACK THEN, MUSICIANS BORROWED MUCH MORE DIRECTLY - NOT JUST STANDARD CHORD SEQUENCES, BUT MELODIES AND SNATCHES OF LYRICS. JOHNSON DID THAT MANY TIMES, AND LATER ROCKERS THEN BORROWED FROM JOHNSON... IT'S AS IF HE WAS THE TRANSFER STATION OF THE BLUES...
KOKOMO ARNOLD "SAGEFIELD WOMAN BLUES"
I BELIEVE I'LL DUST MY BROOM
THE BLUES LINE
SON HOUSE "WALKIN' BLUES"
WALKIN' BLUES
ROBERT JOHNSON
TRAVELLING RIVERSIDE BLUES
KIND HEARTED WOMAN BLUES
HAMBONE WILLIE NEWBERN "ROLL AND TUMBLE BLUES"
CHARLEY PATTON
LEROY CARR "MEAN MISTREATER MAMA"



Robert Johnson (1911–38) is one of the most celebrated blues musicians of all time. He has come to personify a tradition that relied extensively on communal authorship. The comic situates him as a "transfer station" of the blues, borrowing from his predecessors and contemporaries, and inspiring generations of later musicians.

Johnson did not live to see the success of his music. He was murdered when he was only twenty-seven years old—while the circumstances of his death are unclear, many historians think he was given a poisoned drink by the jealous husband of one of his paramours. He died poor and relatively unknown outside of a small circle of followers, and only later was rediscovered by the rock musicians whose tributes you read in the comic. His surviving music came from only two recording sessions. Most of his professional life consisted of live performances. He was an itinerant musician, traveling extensively to play in a variety of settings—juke joints, parties, dances, street corners—sometimes hopping trains or hitchhiking for transportation. He had uncanny guitar skills: as blues musician Johnny Shines, who traveled with Johnson, described it, "his sharp, slender fingers fluttered like a trapped bird." Johnson appeared to develop these capabilities after disappearing for a period from his community, giving rise to a legend that he went to a "crossroads" and sold his soul to the devil for the ability to play the guitar.

Whether or not the devil is involved, Johnson's posthumous fame surrounded him with a mythology that often portrays him through the Western lens of Romantic authorship discussed earlier—as the unique genius behind his influential sound. In response, some scholars have sought to decouple Johnson's "genius" from this aesthetic vision, and anchor his music within the reality of the blues tradition. In the book *Escaping the Delta: Robert Johnson and the Invention of the Blues*, music historian Elijah Wald writes, "when Robert Johnson became a mythic, godlike figure, it was as part of the European religion of art, not any African-American spiritual tradition." Wald describes how Johnson generated "little interest among the black blues fans of his time," for whom his music was simply the mainstream style. It was the predominantly white artists encountering Johnson in a different era who elevated his music to "magnificent folk art." Turning to the Mississippi Delta in Johnson's period, Wald pieces together Johnson's source material: the range of styles he heard on the radio and on jukeboxes, the music he was exposed to during his travels, and the songs he borrowed from, as shown in the comic's "transfer station" graphic. Johnson's creative practices were firmly rooted within the collaborative tradition of the blues, which in turn derived from African-American spirituals and work songs. As author Mark Polizzotti wrote in the *New Republic* in a review of Wald's book: "By the time Johnson began performing, this sound was already well established and had a familiar vocabulary of its own, comprised of a ready pool of musical riffs and 'floating verses' that traveled virtually unchanged from song to song and singer to singer."

While Johnson did not create these inputs, he did absorb and adapt them, mixing them with his own contributions and signature performance style. His talent was undeniable, and he added original material to the blues idiom that meets the "originality" threshold for copyright you learned about in Chapter Four. However, as discussed earlier, musical compositions from Johnson's time were not considered "published" for purposes of federal copyright protection until they were written down. This deprived musicians who had only "fixed" their works on sound recordings of copyright protection. Because Johnson's songs were only distributed as recordings, the older copyright law considered them "unpublished." But, long after his death, his works became eligible for copyright under the newer copyright law when they were released on a boxed set entitled "Robert Johnson—The Complete Recordings" in 1990. By then copyright law had been updated to say that recordings were an acceptable format for music, so the box set qualified as a "publication." Under special rules for works that were created before 1978 and later published, his posthumous copyrights will last through the end of 2047. For those who were able to claim Johnson's rights,[79] the older rules ironically worked to their advantage. Had his songs been copyrighted in the late 1930s, the rights would have expired after twenty-eight years, when they were not renewed. But instead the copyright clock did not start ticking until 1990, thanks to the strange way that copyright has treated the format within which music was "frozen"—to return to the image from the comic—over the years.

Ultimately, Johnson's story illustrates the tension between Black musical traditions and copyright's creative paradigm, but with a twist. Unlike most of his contemporaries, he and his music have effectively been retrofitted into copyright's scheme. Because of how those works were only "fixed" on recordings, and because musicians and fans later became fixated (no pun intended) on his music, his copyright came to life long after his death. He *has* come to be seen as an "author" *par excellence*, and his songs are still generating royalties. As a

[79] The story of Johnson's heirs is long and complicated, and many of the interested parties are now deceased. However we know that in the 1970s a blues enthusiast named Stephen LaVere was able to find Carrie Thompson, Johnson's sister, who transferred her copyright interests in Johnson's music to LaVere in exchange for fifty percent of the royalties, with the understanding that LaVere would work to generate revenue from Johnson's legacy. Before LaVere died in 2015, he was part of a lawsuit that established that Johnson's works were still under copyright, *ABKCO Music Inc. v. Stephen LaVere* (9th Cir. 2000).

result, those who own or benefit from those copyrights—a group that I am glad to say included his sister—were able to "own" a particular iteration of the blues tradition.

We now turn to Chuck Berry, and then to Little Richard. You will read the fascinating stories of their songs "Maybellene" and "Tutti Frutti," works that changed music forever. During their careers, both Check Berry and Little Richard experienced the unfair business practices we have discussed—you will read how they were cheated out of income from "Maybellene" and "Tutti Frutti." Both also experienced the pain of segregation, as well as the ability of music to bring people of different races together.

We begin with a comic excerpt about Chuck Berry, who has been called the "father of rock and roll." Like Robert Johnson, Berry both built upon the past and reshaped the future. As you read the first two illustrations, follow the arrows counterclockwise around the perimeter to see the borrowing that connected country, rhythm and blues, and rock and roll, as well as the later musicians who were indebted to Chuck Berry's influence. The next page will then describe how Berry had to share songwriter credits for his music with people who had nothing to do with writing it.

CHUCK BERRY
1926–2017
IDA RED, SHE AIN'T NO FOOL.. SHE COULD RIDE A'STRADDLE OF A HUMPBACK MULE.
BUT IN BERRY'S HANDS, THAT BECAME...
OH MAYBELLENE, WHY CAN'T YOU BE TRUE?
MEET CHUCK BERRY...
...WHO LISTENED TO BLUES AND COUNTRY, AND TOOK FROM BOTH...
MY SOUL KEEPS ON SINGIN' THE BLUES, ROLL OVER BEETHOVEN, TELL TCHAIKOVSKY THE NEWS!
I SAY IT AGAIN, THERE ARE THOUSANDS OF PRINCES, BUT ONLY ONE BEETHOVEN!!
YOU THINK YOU'VE GOT IT BAD. IMAGINE BEING "THE ARTIST FORMERLY KNOWN AS BEETHOVEN"! HEY, DID YOU HEAR MY COVER OF JOHNNY B. GOODE?
AND ACROSS THE ATLANTIC, SOMEONE ELSE WAS LISTENING...
ROLL OVER BEETHOVEN...
ROLL OVER BEETHOVEN...
THE BEATLES

AFTER THE THREAT OF A LAWSUIT, BERRY GOT CREDIT AND ROYALTIES AS A CO-AUTHOR OF SURFIN' USA.
CHUCK BERRY WAS MIXING COUNTRY, RHYTHM AND BLUES... INVENTING A NEW GUITAR STYLE... AND CHANGING THE WORLD. SOME MUSICIANS WERE FRANK ABOUT THEIR DEBTS TO HIM.
...HE WAS A BROWN-EYED HANDSOME MAN...
IT'S VERY DIFFICULT FOR ME TO TALK ABOUT CHUCK BERRY 'CAUSE I'VE LIFTED EVERY LICK HE EVER PLAYED... THIS IS THE GENTLEMAN WHO STARTED IT ALL!
AYE KEITH, IF YOU TRIED TO GIVE ROCK AND ROLL ANOTHER NAME, YOU MIGHT CALL IT CHUCK BERRY!
BUT SOME ARTISTS JUST TOOK BERRY'S MUSIC FOR THE WHITE MUSIC MARKET OF THE TIME...THE BEACH BOYS WERE THREATENED WITH SUIT FOR COPYING SWEET LITTLE SIXTEEN AND CALLING IT SURFIN' USA.
YOU'D SEE 'EM WEARIN' THEIR BAGGIES. HUARACHE SANDALS TOO.
KEITH RICHARDS
JOHN LENNON

CHUCK BERRY WAS AMAZING!
SURE WAS. BUT AT THE TIME BLACK ARTISTS LIKE BERRY WERE ROUTINELY EXPLOITED. IF BLACK COMPOSERS GOT COPYRIGHT AT ALL, THEY FREQUENTLY HAD TO SHARE IT WITH OTHERS LIKE DJs.
DJs!? THEY GOT COPYRIGHT FOR PLAYING A SONG!?
APPARENTLY. CHUCK BERRY HAD TO SHARE COPYRIGHT ON MAYBELLENE WITH THE DJ ALAN FREED AND ALSO WITH RUSS FRATTO....
DID THAT HAPPEN TO WHITE ARTISTS, TOO?
IT DID. REMEMBER DICK CLARK?
MAYBELLENE, WHY CAN'T YOU BE TRUE, DJ GONNA OWN THE SONGS I USED TO DO!!
AMERICAN BANDSTAND!!
AMERICAN BANDSTAND
THIS SONG IS GOING TO BE A HIT! IT'S GOT A GOOD BEAT AND I CAN COPYRIGHT IT!
THE BOTTOM LINE IS THAT MUSICIANS IN GENERAL HAD LITTLE BARGAINING POWER...
...BUT BLACK ARTISTS HAD THE LEAST OF ALL.
THEY STILL DON'T!

Chuck Berry (1926–2017) was an enormously talented songwriter and performer. His guitar solos were legendary, as was his choreography onstage, including his signature "duck walk," depicted in the comic as he sings "Oh Maybellene, why can't you be true?"

As a songwriter Berry drew upon both country and rhythm and blues, inventing a new style that laid the foundation for rock and roll. You can hear this process play out in

"Maybellene," Berry's breakthrough hit. The song was inspired by "Ida Red," a traditional country tune that Berry liked as a teenager and whose basic melody he borrowed. But Berry's song sounds very different, adding elements of rhythm and blues and energetic guitar riffs. He tells a story about chasing a two-timing girlfriend—he in a V-8 Ford, she in a Cadillac Coupe DeVille—a story drawn, as Berry recalls, "from memories of high school and trying to get girls to ride in my 1934 V-8 Ford." His lyrics feature plays on words: "As I was *motor-vatin'* over the hill/ I saw Maybellene in a Coupe DeVille." These features—the fusion of country and blues traditions, prominent guitar, singing about teenage life and fast cars, wordplay—would come to define early rock and roll.

Listen to "Ida Red" performed by Bob Wills and his Texas Playboys, and "Maybellene." Notice the similarity in the melodies, the background "oompah" rhythm, as well as the meter that accompanies "May-be-llene" and "Id-a-Red"—set within two very different musical contexts.

Berry recorded "Maybellene" for Chess Records. The recording session was exhausting; it took thirty-five tries before making a track that satisfied Leonard Chess, the co-owner of the company. Berry had originally named the song "Ida Mae," but Chess was worried about copyright infringement and felt the similarity between the titles "Ida Mae" and "Ida Red" would only increase that risk. The people in the recording studio had to come up with another name. Pianist Johnnie Johnson recalled: "We looked up on the windowsill, and there was a mascara box up there with Maybellene written on it. And Leonard Chess said, 'Why don't we name the damn thing "Maybellene"?'" But in his autobiography, Berry says he came up with the name, remembering a third-grade storybook that featured a cow named Maybellene: "Not offending anybody, I thought, I named my girl character after a cow. In fact, the girl was to be two-timing, so it would have been worse if I had used a popular name."

Whatever the source of the name, there was no question that Chuck Berry wrote the song "Maybellene" himself, even if he did draw on "Ida Red." After the song was released, however, he was surprised to discover two additional people listed as songwriters. As you read in the comic, one of them was the disc jockey Alan Freed, who had heavily promoted the song. It was not uncommon at the time for DJs who publicized records to share songwriting credit—a form of payola—even though they played no part in writing the songs. The other person was someone Berry had never heard of—a man named Russ Fratto. Evidently Fratto had loaned money to Chess Records, and this was part of his compensation. For years, Berry had to share his copyright and royalties with Freed and Fratto. Only decades later, in 1986, did Berry finally get credit as the sole writer of the song.

This was not the only time Berry was deprived of songwriting credit. The comic excerpt mentions a different copyright dispute in which the Beach Boys' "Surfin' USA" used the music from Berry's "Sweet Little Sixteen." After the threat of a lawsuit, the matter was resolved amicably, with Berry receiving songwriting credit and royalties as a co-author of "Surfin' USA."

Listen to "Sweet Little Sixteen" and "Surfin' USA"

Berry's music appealed to both Black and white audiences. In the 1950s South, those audiences were segregated. Sometimes racial barriers kept Berry from even being able to perform. In Knoxville, Tennessee, he was turned away *from his own concert* when the organizers discovered that he was Black. Because "Maybellene" sounded like a "country dance," they had assumed that he was a white performer. Berry had to go back to his car and listen as a white replacement band played his song.

When he did perform, Berry's music could be a force for integration. At a show in Jacksonville, Florida, Berry had played for a segregated audience, but that changed at the end of the show. Berry recounts in his autobiography:

> twice as many young whites as blacks rushed toward the stage, climbed on, and began socializing with us. After mumbling to ourselves the whole evening about the conditions we performed under, we overwelcomed them, extending hugs and some kisses. We knew the authorities were blazing angry with them for rushing on stage and at us for welcoming them, but they could only stand there and watch young public opinion exercise its reaction to the boundaries they were up against. Almost as if it was rehearsed they hugged, kissed, greeted, or shook a hand and filed off to the exits untouched by the helpless, amazed security.

The next comic excerpt celebrates Little Richard. Like Chuck Berry, Little Richard brought segregated audiences together through his performances. People Magazine described how, by the end of a Little Richard show, initially separated audiences would be mixed together: "the frenzy of his music would wrench everyone out of his seat and cause spontaneous integration." Little Richard reflected, "I've always thought that rock 'n' roll brought the races together. Especially being from the South, where you see the barriers, having all these people who we thought hated us showing all this *love*." In the comic illustration, you will see how he used his appearance to deflect racist fears. "If I was dressed looking like a girl, the white man figured I wouldn't touch his girl," he recalled. He added: "They were still nervous about my band, though."

WELL, IF YOU DON'T WANT TO SEEM LIKE A THREAT – PARTICULARLY ONE THAT'S ATTRACTIVE TO WHITE GIRLS... THE BEST THING IS TO LOOK LIKE...
LITTLE RICHARD!
I'M THE ARCHITECT OF ROCK AND ROLL! ALSO, CHECK OUT MY EYELASHES!
WAS HE REALLY DOING THAT ON PURPOSE?
SURE.
"BY WEARING THIS MAKEUP, I COULD WORK AND PLAY WHITE CLUBS, AND THE WHITE PEOPLE DIDN'T MIND THE WHITE GIRLS SCREAMING OVER ME... THEY WAS WILLING TO ACCEPT ME, 'CAUSE THEY FIGURED I WOULDN'T BE NO HARM."
HA! LITTLE RICHARD WAS HOT!!!
SECULAR AND RELIGIOUS MUSIC HAVE LONG BORROWED BACK AND FORTH, INCLUDING IN THE RENAISSANCE.
AND IT CERTAINLY DIDN'T STOP IN THE 15TH CENTURY. LITTLE RICHARD TOOK GOSPEL MUSIC WITH ITS WAILING AND MOANING AND TESTIFYING AND HE LAYERED RHYTHM AND BLUES ON TOP OF IT!
I'M THE INNOVATOR, I'M THE EMANCIPATOR, I'M THE ORIGINATOR, I'M THE ARCHITECT OF ROCK 'N' ROLL.
ONE OF HIS BIGGEST HITS CAME WHEN HE TOOK A PRETTY VULGAR SONG HE HAD PERFORMED BEFORE...
I'VE LEARNED MY LESSON ABOUT ASKING FOR THE WORDS!
...AND RELEASED IT WITH CLEANED-UP LYRICS...

Little Richard (1932–2020), born Richard Wayne Penniman, has been dubbed the "architect of rock and roll." As described by the *New York Times*, Penniman "combined the sacred shouts of the black church and the profane sounds of the blues to create some of the world's first and most influential rock 'n' roll records." His first major hit was "Tutti Frutti." You read the opening lines from this song in the comic excerpt. Before it was released as a

recording, Penniman had been performing a much raunchier version of this song—the original refrain was "Tutti frutti, good booty," with later lyrics becoming more graphic. For the recorded version, the song's producer hired a songwriter named Dorothy LaBostrie to clean up the lyrics, and she replaced "good booty" with "aw rootie," slang for "all righty." As a result, Penniman shared songwriting credit on the song with LaBostrie.

"Tutti Frutti" was a success, but Penniman was not the one who took in the spoils. He had to contend with both white cover versions and the kinds of lopsided contracts discussed earlier in this chapter. First, as you read in an earlier comic excerpt, Pat Boone recorded a cover version that outsold Penniman's original. Elvis and others also covered the song. In addition, Penniman lost out on the earnings he could have received due to an unfair contract with his record company, Specialty Records. Even though he both wrote and recorded "Tutti Frutti," it was Specialty rather than Penniman that took in the bulk of the song's proceeds. He sold his publishing rights for "Tutti Frutti" to Specialty for only $50. Because he no longer owned those rights, he received no royalties for cover versions or other reuses. For the sales of his recordings, his contract with Specialty gave him only half of a cent for each record sold, compared to the cut of between three and five cents that white artists reportedly received. In his authorized biography, Penniman recounted: "I had signed a very bad deal with Specialty. If you wanted to record, you signed on their terms or you didn't record. I got half a cent for every record sold. Who ever heard of cutting a penny in half!"

As discussed earlier, it was not uncommon for Black artists to have to sell their rights for a pittance, or to receive minuscule royalties for record sales. For Penniman and others, these were the conditions of getting a record deal, and Black artists who showed too much business savvy risked being pushed aside. As with Bessie Smith and others, Penniman's earnings had to come from live performances. Penniman described: "We were exploited, abused, misused and just plain ripped off by record labels and management…we knew that to make money, we had to go on the road, and it had to be with the best show in the U.S."

13.5 SEGREGATION

The stories of Chuck Berry and Little Richard and their experiences with segregation bring us to the penultimate section in this chapter. Historically, the fear of Black culture and Black music led to attempts to impose barriers not only between human beings, but between musical forms. The following comic excerpt shows remarkably racist reactions to jazz from a 1924 issue of *Etude Music Magazine*.

WHAT WERE SOME EARLY REACTIONS TO JAZZ MUSIC?
LET'S LOOK AT THE AUGUST 1924 EDITION OF ETUDE MUSIC MAGAZINE..."THE JAZZ PROBLEM"!
ETUDE MUSIC MAGAZINE
THE JAZZ PROBLEM
Opinions of Prominent Public Men and Musicians
AUGUST, 1924
SOME SAW JAZZ AS THREATENING AND DEBASED MUSIC...
TAKE GEORGE ADE, FOR EXAMPLE...
GEORGE ADE
THE CRUDER FORM OF "JAZZ," A COLLECTION OF SQUEALS AND SQUAWKS AND WAILS AGAINST A CONCEALED BACK-STRUCTURE OF MELODY, BECAME UNBEARABLE TO ME SOON AFTER I BEGAN TO HEAR IT.
MRS. H.H.A. BEACH
IN ASSOCIATION WITH SOME OF THE MODERN DANCING AND THE SENTIMENT OF THE VERSES ON WHICH MANY OF THE "JAZZ" SONGS ARE FOUNDED, IT WOULD BE DIFFICULT TO FIND A COMBINATION MORE VULGAR OR DEBASING.
TAKE MRS. H.H.A. BEACH AS ANOTHER...
SOUSA DEFENDED IT, THOUGH...
LT. COM. JOHN PHILIP SOUSA
THERE IS NO REASON, WITH ITS EXHILARATING RHYTHM, ITS MELODIC INGENUITIES, WHY IT SHOULD NOT BECOME ONE OF THE ACCEPTED FORMS OF COMPOSITION.

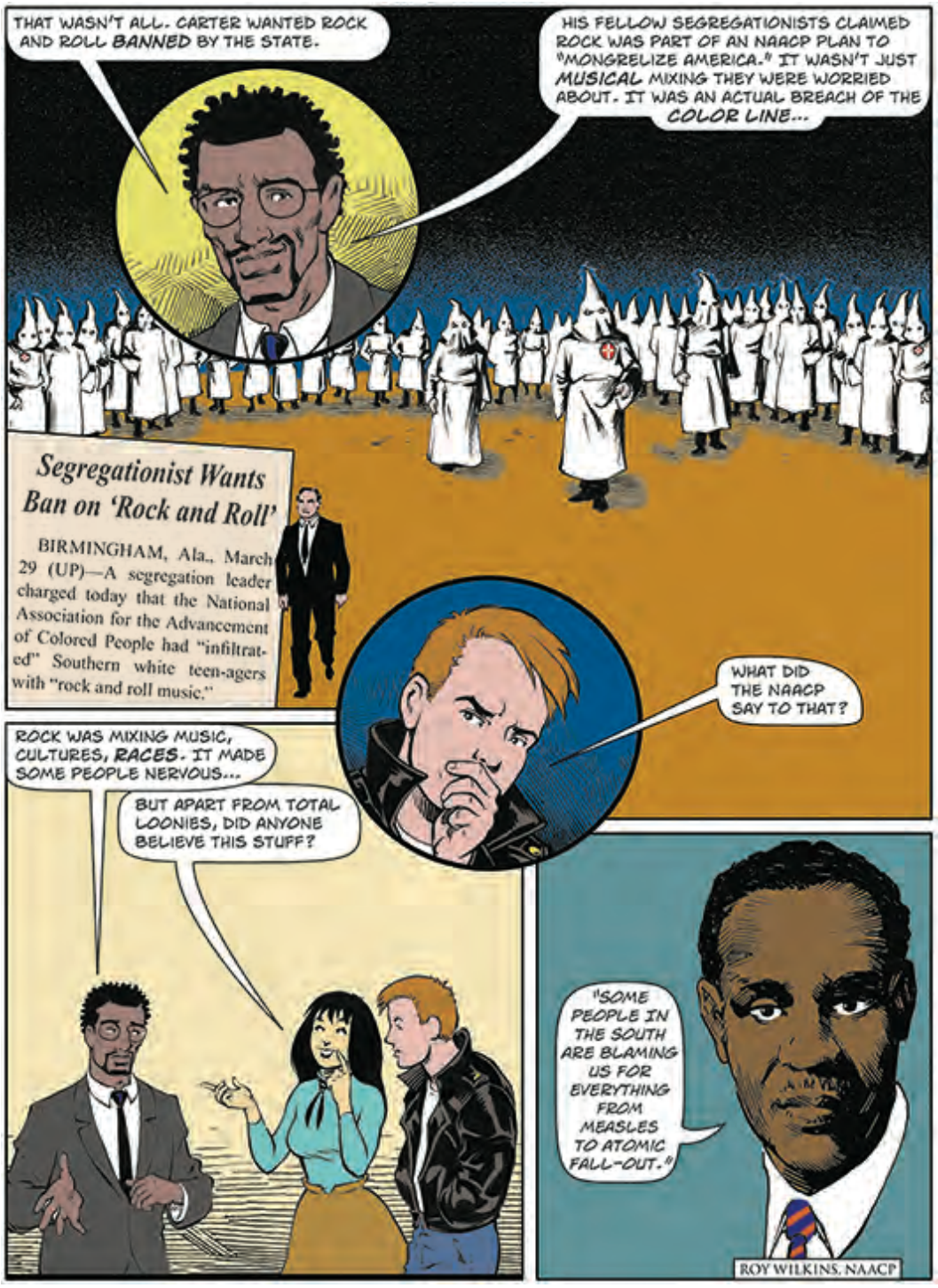
...A FEW WERE FRANKLY RACIST ABOUT ANY STYLISTIC MINGLING.
JAZZ IS TO REAL MUSIC WHAT THE CARICATURE IS TO THE PORTRAIT... IF JAZZ ORIGINATED IN THE DANCE RHYTHMS OF THE NEGRO, IT WAS AT LEAST INTERESTING AS THE SELF-EXPRESSION OF A PRIMITIVE RACE. WHEN JAZZ WAS ADOPTED BY THE "HIGHLY CIVILIZED" WHITE RACE, IT TENDED TO DEGENERATE IT TOWARDS PRIMITIVITY.
FRANK DAMROSCH
THE JAZZ PROBLEM
Opinions of Prominent Public Men and Musicians
PEOPLE SAID STUFF LIKE THAT??!! THEY EVEN FEARED MUSICAL MISCEGENATION?
YES, INDEED. BUT OTHERS HAILED IT AS EMBLEMATIC AMERICAN MUSIC, A GREAT CONTRIBUTION TO THE NATIONAL REMIX.
JAZZ PROMPTED RACIAL ANXIETIES, BUT IT ALSO REACHED ACROSS THE COLOR BAR, BREAKING CULTURAL BARRIERS. IT'S HARDER TO STEREOTYPE PEOPLE WHO ARE YOUR ARTISTIC HEROES.
WHEN RAP MUSICIANS TODAY WANT TO JUSTIFY SAMPLING OTHER TUNES, THEY SOMETIMES COMPARE IT TO BORROWING IN JAZZ...
BUT JAZZ WAS JUST AS CONTROVERSIAL IN ITS HEYDAY!
MAKES YOU WONDER HOW PEOPLE WILL BE TALKING ABOUT RAP IN 100 YEARS...
YOUR HONOR, WHAT I AM DOING IS REALLY NO DIFFERENT THAN WHAT THE ESTEEMED SNOOP DOGG OR LIL WAYNE DID IN THE EARLY DAYS OF THE 21ST CENTURY...
YOU DARE COMPARE YOURSELF TO A CLASSICAL RAPPER!!!!!???

In this excerpt, "prominent public men and musicians" expressed derogatory opinions about jazz, characterizing it as an inferior and debased sound that might somehow "degenerate" the white race "towards primitivity." These reactions are upsetting and probably seem strange today when jazz has reached culturally iconic status and is played in venues like Carnegie Hall and the Kennedy Center. Some of you might even find jazz boring,

and find it absurd that it was ever considered a threat. But the racial prejudice and hierarchies of the time gave rise to anxiety about the power of Black music—including its ability to disrupt those hierarchies. And music *did* have the power to overcome societal barriers. As the comic book character says in the excerpt, "it's harder to stereotype people who are your artistic heroes." He also muses about the cycle of musical change that we talked about in Chapter Ten—will future generations look at rap the way you look at jazz today? What will be the next controversial art form?

Returning to history, rock and roll certainly engendered controversy—even hysteria—and responses to it reflected continuing attempts to reinforce racial barriers. These are depicted in the next excerpt.

IT WASN'T ONLY JAZZ THAT MADE PEOPLE SCARED...
HERE'S GEORGE WALLACE'S SPEECH WRITER, ASA CARTER, ON ROCK AND ROLL...
"[ROCK AND ROLL IS THE] BASIC, HEAVY-BEAT MUSIC OF THE NEGROES. IT APPEALS TO THE BASE IN MAN; BRINGS OUT ANIMALISM AND VULGARITY...
"[IT COMES FROM] THE HEART OF AFRICA, WHERE IT WAS USED TO INCITE WARRIORS TO SUCH FRENZY THAT BY NIGHTFALL NEIGHBORS WERE COOKED IN CARNAGE POTS!!"
!
ROCK AND ROLL = CANNIBALISM ?!?
WELL, I DIDN'T SEE THAT ONE COMING...
SEX AND DRUGS, SURE...
BUT NOW WE'RE SAYING ROCK AND ROLL CAN LEAD TO EATING PEOPLE?
Court's Brown decision a "clear abuse of judicial power," they pledged not to obey it. At the end of the year six southern states had not yet allowed a single black child into a school attended by whites. Rock 'n' roll became a target of southern segrationists, who believed that race mixing led, inevitably, to miscegenation and that exposure to black culture promoted juvenile delinquency and sexual immorality. Asa Carter, former radio commentator, soft-drink salesman, and member of Ku Klux Klan Klavern No. 31, used the threat of rock 'n' roll to enhance his status as a leader of the White Councils in Alabama. Lumping together rock 'n' roll, bebop, blues, "congo rhythms," and "jungle music" Carter got the attention of Newsweek.
Altschuler, All Shook Up: How Rock 'n' Roll Changed America


THAT WASN'T ALL. CARTER WANTED ROCK AND ROLL BANNED BY THE STATE.
HIS FELLOW SEGREGATIONISTS CLAIMED ROCK WAS PART OF AN NAACP PLAN TO "MONGRELIZE AMERICA." IT WASN'T JUST MUSICAL MIXING THEY WERE WORRIED ABOUT. IT WAS AN ACTUAL BREACH OF THE COLOR LINE...
Segregationist Wants Ban on 'Rock and Roll'
BIRMINGHAM, Ala., March 29 (UP)—A segregation leader charged today that the National Association for the Advancement of Colored People had "infiltrated" Southern white teen-agers with "rock and roll music."
WHAT DID THE NAACP SAY TO THAT?
ROCK WAS MIXING MUSIC, CULTURES, RACES. IT MADE SOME PEOPLE NERVOUS...
BUT APART FROM TOTAL LOONIES, DID ANYONE BELIEVE THIS STUFF?
"SOME PEOPLE IN THE SOUTH ARE BLAMING US FOR EVERYTHING FROM MEASLES TO ATOMIC FALL-OUT."
ROY WILKINS, NAACP

UNFORTUNATELY, THESE "LOONIES" WERE RUNNING A BIG CHUNK OF THE COUNTRY! BUT, YES, OTHERS ACTUALLY DID AGREE. AT LEAST THE PART ABOUT "PRIMITIVE" MUSIC BEING ABLE TO BYPASS RATIONAL THOUGHT...
THEY WERE TALKING AS IF ROCK WERE A VIRUS, TAKING OVER ITS HOSTS!
ROCK and ROLL INFLAMES
...AND PEDDLING PARANOIA WAS A BIG BUSINESS...
AND EXCITES YOUTH LIKE JUNGLE TOM-TOMS
HERE'S WHAT LAIT AND MORTIMER, JOURNALISTS WHO WROTE THE POPULAR CONFIDENTIAL SERIES, HAD TO SAY ABOUT THE "ROCK SCENE."
CHICAGO CONFIDENTIAL
by JACK LAIT and LEE MORTIMER
"...Tom-toms and hot jive and ritualistic orgies of erotic dancing, weed smoking and mass mania with African jungle background. Many music shops purvey dope; assignations are made in them. White girls are recruited for colored lovers... we know that many platter-spinners are hop heads. Many others are Reds, left-wingers or hecklers of social convention."
WELL! I CERTAINLY WOULDN'T WANT TO CONSORT WITH "HECKLERS OF SOCIAL CONVENTION."

In the 1950s and 1960s, the battle over segregation was fought not just over lunch-counters, schools, and voting booths, but also over music. The White Citizens Council of North Alabama denounced rock and roll because it brought "people of both races together." In the comic excerpt, you read quotes from segregationists who so feared the effect that rock and roll might have on people, especially the "youth," that they wanted it banned.

As you learned in the previous section, rock and roll was heavily influenced by Black artists. Segregationists were worried that exposure to another race's *music* might bring about *actual* integration and wanted to reinforce the color line through a musical apartheid.

As you read in the stories about Chuck Berry and Little Richard, this effort failed. Music not only moves us and makes us want to dance—it can also move our minds, breaking down prejudices and stereotypes. Set their hips in motion and their minds will surely follow. Recall the earlier quote from Walter White, the Executive Secretary of the National Association for the Advancement of Colored People (NAACP), who thought that music could be a force for integration. He was right.

There was also a different form of segregation imposed within the music industry—a **market segregation** that took the form of isolating Black music from mainstream popular music. This resulted in the racial coding of music genres—as music professor Jocelyn Neal explains: "There is a history of systemic racism in the way that the genres are defined for the public." Professor Emeritus and music historian Reebee Garofalo describes how Black music received disparate treatment: "Because of industry and audience racism, black music has been relegated to a separate and unequal marketing structure." As mentioned earlier, some of the inequalities persist even today, prompting a response from parts of the music industry.

Between the 1920s and 1940s, the dividing of music along racial lines was explicit. Record companies had special "race records" subsidiaries for music that was created by Black artists and marketed to Black audiences, including blues, jazz, and gospel music. "Race music" was largely excluded from mainstream radio play and pop charts, and refused by some record stores and performance venues. But it was *really good music*, and as you have learned in this chapter, it became popular and influential. It was also profitable for the record companies, not only due to its quality, but also due to the rampant exploitation of the artists making it. (A note about the jarring language: at the time, "race" was used both negatively to segregate music into racial categories, and also positively in a self-referential sense by African-Americans. In the book *Race Records*, author Guthrie P. Ramsey, Jr. explains: "Calling oneself or being referred to as a race man or race woman became a way to display pride in being an African American.")

It was not just Black music that was separated into a racially-coded category. Industry practices also carved out "hillbilly" music that was made by and for white audiences, particularly those from rural and Southern communities. Eventually the music industry updated its problematic terminology: thanks in part to relabeling by the *Billboard* charts, by 1949 hillbilly music became known as "country and western" music, and race music was rebranded as "rhythm and blues" music. As mentioned earlier in this chapter, these racially defined marketing categories did not reflect the how music was actually made. Even in the segregated South, Black and white musicians played together and influenced one another. Many Black musicians played fiddle and banjo and sang country music, and many white musicians played an important role in early blues music. It was the melding of blues and country influences that built rock and roll. Despite efforts to contain its fluidity, music has always thwarted racial boundaries.

In 2019, Lil Nas X's experience with his breakthrough country/ trap hit "Old Town Road" brought fresh attention to market segregation and the artificial delineations between genres. "Old Town Road" initially charted on *Billboard*'s Hot 100, Hot R&B/Hip-Hop Songs chart and Hot Country Songs chart. But then it was kicked off of the country chart, with *Billboard* explaining: "While 'Old Town Road' incorporates references to country and cowboy imagery, it does not embrace enough elements of today's country music to chart in its current version." Lil Nas X responded by telling *Time* Magazine: "The song is country trap. It's not one, it's not the other. It's both. It should be on both [charts]."

Lil Nas X's story brings us to a final note on terminology. It is important to separate the different ways of categorizing music that have been mentioned in this chapter: musical "genre" is distinct from the deeply problematic marketing construct of "race music," which is in turn distinct from the general descriptive category of "Black music." Here are the differences. *Genres* are used to group together songs that share certain *musical* features. Terms such as "blues" or jazz" provide scholars, fans, and businesses with a shorthand to refer to particular styles of music. However, as you may have noticed in your own musical journey, genres change over time—they are fluid and evolving and there are no clean divisions between them. But the key is that these musical genres are not racially delineated. Race comes into play only to the extent that some of the most prominent artists producing something like the "blues" were African American and imbued the music with features such as call and response, syncopation, or blue notes. But blues is not inherently Black, just as country is not inherently white. This distinguishes "genre" as it is used in this chapter from something like "race music," which *was* a racial construct used in a negative way to segregate music made by Black Americans from the mainstream market, and to profit from it at the artists' expense. Different from both of these is the broader category of "Black music," which describes music produced by Black artists—across genres and traditions—for the purpose of celebrating those creators' contributions and drawing attention to how they were unfairly treated.

Black Swan Records

Photo 13.8

Before Motown, Vee-Jay, Def Jam, or Bad Boy Records, there was Black Swan Records (Photo 13.8), the first successful Black-owned record company in America. It was started in May 1921 by an African-American entrepreneur named Harry Pace. Pace was the valedictorian of his class at Atlanta University, after which he taught Latin and Greek and was a successful insurance and banking executive before venturing on many other pursuits. (You can listen to a six-part series about his life on Radiolab. It had surprising twists and turns. This feature box focuses only on the early Black Swan chapter.)

A serendipitous encounter with bluesman and entrepreneur W.C. Handy, who was mentioned earlier in this chapter, took Pace into the music business. Together they ran the Pace

and Handy Music Company. Soon their business models diverged, however—it was the early days of sound recording technology, and Handy was set on the business of selling sheet music, while Pace noticed the potential in selling records. He broke with Handy and entered the recording business.

The "Black Swan" name was suggested to Pace by none other than the eminent sociologist W. E. B. Du Bois, author of *The Souls of Black Folk* and co-founder of the NAACP. It was a reference to Elizabeth Taylor Greenfield, an African-American soprano from the 1800s who was known as the "black swan." Du Bois had been Pace's friend and mentor at Atlanta University. They subsequently started a printing company together, and Du Bois served on Black Swan's Board of Directors. Du Bois helped to instill in Pace a passion for empowering the African-American community, and Black Swan Records reflected this motivation.

Black Swan offered something different from the record companies of the time in terms of both output and business practices. Those companies were still releasing the demeaning minstrel songs discussed earlier, and as you know they were regularly claiming ownership of music written by Black artists. As highlighted in its advertisements, Black Swan was "owned and controlled" by Black people and featured exclusively Black "voices and musicians." Its offerings went beyond blues and jazz to include opera and classical music from Black performers. There were no other Black-owned record companies, and Black Swan quickly became the target of harassment and threats from white-owned companies. As described by the African-American newspaper the *Chicago Defender*: "News of the completion of the first list of Black Swan Records, which are now ready for delivery, will be received with great interest and enthusiasm by our people all over the United States. When the announcement was made that a company had been formed to manufacture phonograph records by our artists, a great uproar was caused among white phonograph record companies who resent the idea of having a race company enter what they felt was an exclusive field."

For a brief period, Black Swan was a success. Its first hit was "Down Home Blues" by Ethel Waters, the first Black woman to sing on American radio, who some have called the Beyoncé of her time. The company also signed a who's who of Black talent from the era, including blues singer Trixie Smith, jazz great Fletcher Henderson, and opera singer Florence Cole Talbert. At one point, it was selling around 7,000 records a day, and it ultimately released around 350 tracks.

The success did not last, however. Competitors took note and began to launch their own "race records" imprints—Paramount did this in 1922, followed by Columbia and Victor in 1923. With larger budgets for promotion and distribution, they were able to lure away Black Swan's talent. Black Swan could not compete. As his business deteriorated, Pace turned to desperate and unfortunate measures. Earlier, along with his purchase of a record pressing plant, he had obtained unreleased recordings from a defunct record label. These recordings were by white bands, and Pace decided to release them and change the names of the artists so that people would think they were Black performers. Needless to say, this did not help his cause.

Black Swan went bankrupt and was purchased by Paramount Records in 1924. Its legacy continues, however. Paul Slade, the author of *Black Swan Blues: the Hard Rise and Brutal Fall of America's First Black Owned Record Label*, described its pivotal role in changing the course of American music, telling the Radiolab podcast that "Black Swan really hastened the process

of the white labels giving Black artists a chance." Slade explained that without Black Swan, had this process been delayed, "we'd have no Robert Johnson. And with no Robert Johnson, you've got no Rolling Stones and no Eric Clapton."

13.6 HARMONY

This chapter has offered a story of exploitation and expropriation, but also of resilience. Throughout our history, Black artists have experienced discrimination, segregation, and an exclusionary music business that deprived them of the credit and compensation their work so richly deserved. They were disadvantaged by structural biases within the law and by unequal access to its tools. But Black artists and entrepreneurs also managed to overcome the forces that pushed against them—from W.C. Handy to Little Richard to the Black artists and icons you admire today. The following comic illustration adds a brighter fanfare to the dark minor chords and expresses the hope that "the staff of music is long, but it bends toward harmony." This is a reference to Dr. Martin Luther King's famous quote "the arc of the moral universe is long, but it bends toward justice," itself inspired by an 1853 sermon by the abolitionist minister Theodore Parker. [80]

[80] Parker's quote was: "I do not pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice."

BARRIERS AND PREJUDICES, DISRUPTION AND OUTRAGE, BUT THE MUSIC ROLLS ON, GENERATION AFTER GENERATION.
"THE STAFF OF MUSIC IS LONG, BUT IT BENDS TOWARDS HARMONY?"
SOMETHING LIKE THAT.

SUMMARY

Music is powerful. In Chapter Three, we discussed how the new technology of radio, during a time of legally-enforced segregation, allowed Black music to cross racial boundaries, giving those who heard it the opportunity to appreciate our common humanity.

That theme continued in this chapter, with stories of how music helped breach the color line, give the lie to the ugly claims of white supremacy, and bring people together. We are all better off because of the contributions of Black artists not just to our musical heritage, but also to the continuing search for racial justice. The path has been anything but straight and the unjust appropriation along the way has been egregious. That struggle is not yet over. Efforts to right past wrongs and address persisting inequality continue. Yet it would also be incomplete to refrain from celebrating our remix national culture, in all of its rich complexity. Those who wanted to police the boundaries of music by race—the racists who feared jazz, the segregationists who wanted to ban rock and roll—they *lost*. That is a good thing.

Coda

This book has introduced you to the history, theory, and the basic rules of music copyright law. The next time you encounter a "your song sounds like mine!" claim you will have the tools to analyze its merits. But hopefully the book has also done more, showing you that behind the music we love is a fascinating and interconnected story of law, technology, aesthetics, and economics. These forces are constantly in motion, changing how artists make a living, how fans enjoy music, even how that music *sounds*. You are now living in a world that only a few decades ago was a mere fantasy, with millions of songs, and the tools to create new ones, at your fingertips. What will the next cycle bring? As you experience it, hopefully this book will have given you a new perspective on the factors at play.

The key points from this book are summarized at the end of each chapter, and also presented in the form of charts, timelines, and infographics that break down the content and the evolution of the legal rules. Those summaries and charts are the most useful way to review that material and this conclusion will not attempt to duplicate them. Beyond those specific details, though, the book has introduced some deeper themes. Here is an attempt to gather them together in one place.

HIDDEN CHOICES

Music and other creative activities do not just "happen" serendipitously. Society makes choices about whether and how to incentivize their production and distribution. The economic, legal, and technological structures that result shape the content of our culture, both popular and highbrow. The thought experiment we conducted in Musicland showed how many options there are, from amateurism and folk-creation, through patronage, to state-funded art, to mass markets built over a structure of copyright. The culture we live in is shaped by these choices. The works that Mozart composed for the Prince-Archbishop Colloredo or Emperor Joseph II, in a world without copyright or the technologies of recorded music, are different from the music you hear today, optimized for the streaming world, with the hook packed into the first thirty seconds to ensure that the stream qualifies for payments and its beat structure and "drop" built around big data analysis of thousands of similar songs. But patronage or state-sponsored music can also serve up bland mediocrity that toadies to the powerful, and the mass market has given us searing protest songs, the blues, rock and roll, and rap that comments on the world we live in. So, yes, systemic choices have consequences, but those social choices are not absolute, and our system is a diverse one, not a musical monoculture. True, most of the music that you hear probably comes to you on the back of a mass-market music business built around copyright law's rights of exclusion and driven by private incentives. But even in our system there is state-supported art. There is still patronage, both by wealthy individuals or cultural institutions and on a distributed basis. There is a thriving amateur scene of folk-creativity. This book invited you to spot these different creative economies and to understand how, collectively, they shape our culture.

THE ECONOMICS AND LAW OF INTANGIBLE PROPERTY

Copyright, and intellectual property in general, deals with property that is very different from a cup of coffee or an apple. If I eat the apple, you cannot, but both you and I can listen to the same song and easily share it in digital form. Economists call goods like this "public goods"—they are "non-excludable" (it is hard to give them to one person while excluding another) and "non-rival" (my use does not impede yours). But how will markets function with such goods? When the public good is a lighthouse or an asteroid defense system, it is hard to imagine how a market will work. We cannot exclude the people who did not pay for the asteroid defense system from its protection, or only allow the paying sailors to see the lighthouse. If songs can be played by all and shared freely at low cost, how do musicians get paid? True, they could glean their pay from focusing on the portions of their art that *are* excludable: the concert hall, the merch, or the limited edition non-fungible token. But copyright offers a new form of exclusion. It takes *some* of these public goods and creates artificial legal rights to exclude from *some* actions—the ones you studied in this book; reproduction, distribution, the creation of derivative works, public performance, and so on. But, in doing so, it also aims to leave lots of material *unprotected* so that it can be used by future creators to make more music in the future. It is the *balance* between the stuff that is private and public, owned and free, property and commons, that "promotes the progress," not the property rights alone. A system that under-protects can be harmful to creativity, but so can one that over-protects. In the chapters about copyright infringement and fair use, subconscious copying, the "Blurred Lines" case and its successors, and about digital sampling, you saw copyright law try—and sometimes conspicuously fail—to get that balance right.

REALITY IS INTERDISCIPLINARY

In college we specialize in certain areas: economics, business, history, technology, aesthetics, political science or legal studies. That specialization brings great benefits but it also imposes a cost; reality does not observe disciplinary boundaries. Perhaps that is why it is so interesting. That insight is certainly not particular to this subject, but one of the central goals of this book was to underline it for you. We have looked at too many examples in the book to review all of them, but our discussion of the multiple causes behind waves of creative transformation illustrates the point particularly well.

One of the concepts the book focused on was **creative destruction**, a term often associated with the economist Joseph Schumpeter who used it to describe the cycles of disruption and reinvention that characterize economic activity. We are not still using whale oil lamps, riding in horse-drawn carriages, or using intermediaries called "travel agents" to book our trips. Each of those industries was destroyed, in a sense, but the destruction was generative: a phoenix rose from each set of ashes. Those transformations were triggered in part by technological innovations, but their effects were "mediated through"—significantly

changed by—political, cultural, organizational and legal factors that influenced or were even necessary preconditions for the fundamental economic change to occur in the first place. The history of the music economy demonstrates this point with remarkable clarity.

Copyright law enables a particular type of market for music, one radically different from a world of patronage alone. **Technologies** offer modes in which that market can develop. Musical notation allows music to be preserved and sold over time and space. Recording allows me to hear Caruso's opera or Kendrick Lamar's rap performed by the artists themselves, putting a virtuoso instead of an amateur in everyone's living room, car, or earbud, and potentially creating a winner-takes-much market for the musical celebrity. A global digital network offers a "celestial jukebox," a global stream of music provided as service, not product.

Political science illuminates the way that industries are sometimes able to write the rules of the road to enshrine their current business models as legally required, and the same tools help explain the kudzu-tangle of music licenses that have accumulated over time, each defended by a different group of intermediaries, even when this could hold back innovative new music delivery systems.

Computer science offers insights into both big data and the algorithmic recommendations that flow out of that data. **Economic incentives** are built around all of those forces, directing everything from the shape and sound of the music to the method of its delivery. Together, these influence our **culture and aesthetics and music** and are in turn influenced by them. The factors I have listed may tell you that the music market of the 1960s would be dominated by radio, TV, and the world of the vinyl single or album. They do not tell you whether the songs on that album will be psychedelic, anti-war, rock anthems, or romantic ballads, or whether they will be built on the African American rhythm and blues tradition. They certainly do not tell you whether those African American musicians will receive either the credit or the remuneration they deserved. For that, you might have to turn to **African American Studies** or **American History**. **Economics** also tells us what to expect from monopolies and oligopolies, whether the monopolies come in the form of the Aeolian Company that attempted to monopolize recorded music in the early 20th century, or the major labels and platforms who today dominate the recorded music industry.

CONCLUSION

It is time for an overall assessment of where the law of music is, and where it should be. The book's Overture posed the questions: "Did we make the right decisions?" and "Are we still making them?" In general, our choice of *copyright* to stimulate creativity has brought many benefits. Musicians can support themselves from their art without having to rely on a wealthy patron or government grants. They have important rights that allow them to control their creations, as well as certain freedoms to build upon the culture around them. Valuable industries are built upon copyright's foundation.

So far, so good. But sometimes the law gets in the way of creativity. My opinion is that cases such as the "Blurred Lines" and *Bridgeport* decisions were wrongly decided. For

copyright to fulfill its mission, basic pitch sequences, chord progressions, defining stylistic elements, snippets of recorded sound, and other raw materials need to remain available for all creators. The law contains many mechanisms—originality, scènes à faire, access, *de minimis,* substantial similarity, fair use, etc.—that, properly applied, can help to ensure that meritorious claims are vindicated and overreaching ones are discarded. To that end, the Led Zeppelin, Katy Perry, Ed Sheeran, and *Salsoul* cases are a step in the right direction.

Beyond this balancing act, another aspect of copyright that is ripe for reform is the rights clearance morass for uses such as sampling and digital music delivery. No one designing such systems from scratch would construct something so unnecessarily convoluted. But, thanks in part to inertia and entrenched interests, we have bewildering clearance practices for samples and a maze of licenses for streaming. The results are inefficient, anticompetitive, and harmful to artists and to fans. In an ideal world, we would jettison the existing frameworks and implement streamlined licensing schemes that allow samplers to create and entrepreneurs to offer new products while ensuring that the rights owners get compensated. In the real world, solutions will likely come from the kinds of private and piecemeal initiatives covered in this book.

As the law lags behind technological change, many of our right or wrong "decisions" will be made by private actors, often in the form of industry deals and technologies such as automated filtering systems. To avoid the problems associated with YouTube's Content ID system, which regularly interferes with perfectly legal activities, such approaches should be more transparent and have a better dispute resolution procedure. More broadly, industry practices need to better account for the interests of artists, who often do not have a seat at the table or suffer from a lack of information and bargaining power.

Many parties play valuable roles in the music ecosystem—labels, publishers, managers, and (yes) lawyers—but artists' rewards are frequently not commensurate with their contributions. Time and again we have seen musicians getting the raw end of the deal: losing out on both sides of the sample clearance process, receiving a tiny proportion of streaming revenue, finding themselves bound by inequitable contracts. The sheer complexity of the regime has an exclusionary effect. Going forward, if we want to take things to where they *should* be, artists would be empowered by greater transparency and participation in negotiations as well as other efforts to address past and current inequities.

In the end, the subject of this book—copyright law—is not merely a dull list of rules and exceptions. It shapes and is shaped by the cycles we have explored. One thing should not get lost in the interdisciplinary jungle. Amid all of this, there is a constant: artists making music, riding the waves of creative destruction to find the next way to share their art with the world and make a living doing so. It is those artists who inspired me to write this book.

Questions for class

OVERTURE

1. As music czar, your job was to encourage the production of music—lots of it. You have read about four options: a) let it develop as an amateur activity, b) fund it with patronage, c) have the government subsidize it, and d) copyright, something you will learn much more about in this book. Evaluate each option. What are the advantages and disadvantages of each approach?

2. What additional opportunities does today's technology enable? What are the trade-offs of those options?

3. Provide your own example of something that would count as plagiarism, but would not be copyright infringement. Then offer an example of something that would probably be copyright infringement but not plagiarism.

CHAPTER 1

1. You have now met Anita, Barry, and Calandra. Whose views make the most sense to you?

2. Why is it difficult to "own" music when it is part of an oral tradition? What are some of the essential preconditions for owning music?

3. What is your conception of an "author"? Who best fits that model: Anita, Barry, Calandra, or perhaps all three of them?

4. Take another look at the comic book timeline. What key changes occurred in each of these categories? How did each of these interact with copyright law?
    a) attitudes toward borrowing and how creativity happens
    b) how artists were getting paid
    c) transformative technologies

5. Turning to the present day, what changes do you think are now happening in each of the three categories above?

CHAPTER 2

1. What is the goal of copyright?

2. In economic terms, how is producing music different from producing something like beer?

3. What is the difference between economic rights and moral rights?

4. What are three key differences between physical and intellectual property?

5. What did you think of the examples of borrowing from the comic, including the audio you listened to? Where would you rank them along the spectrum from totally derivative to highly

original? How about the music you currently listen to—what are some examples of borrowing in that music?

6. List four key changes in copyright law since its inception.

CHAPTER 3

1. List three historical, legal or aesthetic changes brought about by sound recording technology, and three changes brought about by radio.

2. Which do you think was more revolutionary for music—including artists, consumers, and the industry—the internet, or sound recording technology? This question solicits your intuitive response; you are encouraged to revisit your answer after reading Chapters Eleven and Twelve, which provide more details about how the internet changed the world of music.

3. What are mechanical reproductions? How does copyright's "compulsory license" enable their production?

4. Explain the difference between the © *composition* copyright, and the separate ℗ *sound recording* copyright. In the United States, how long has each of these rights existed?

5. When songs are played on the radio (old-fashioned terrestrial radio, not internet radio), how are the royalties collected and distributed?

CHAPTER 4

1. You have now learned about how copyright defines originality—in theory, as long as you came up with the material yourself, and there is a minimal amount of creativity, it's original. Do you agree with this rule? What would happen if the threshold was more demanding, and music had to be *unique* to be "original"? What kinds of songs would be eligible for copyright protection? On the other hand, what are the implications of the current rule, when anyone who independently creates a tune can own it, so long as it is sufficiently creative and not otherwise ineligible for copyright?

2. Why is it difficult to pinpoint musical ideas? Musical facts?

3. Select five representative songs from a genre that you like and make a list of at least five things—from either the music or lyrics—that you think *should* be considered scènes à faire. Now make a list of at least five elements in those songs that are *not* scènes à faire and should be covered by the songwriter's copyright.

4. What are the key exclusive rights that copyright gives to owners of musical compositions? Give one example of something that each of those rights would allow the rights holder to stop.

5. What are two challenges involved in applying copyright's rules to music, as opposed to other art forms?

6. What parts of "Choir" were part of James Newton's composition? What parts of "Atomic Dog" were part of George Clinton's composition? Are the two cases consistent?

CHAPTER 5

1. Why is "access" required to show copyright infringement? What is the difference between establishing access by "widespread dissemination" and by a "chain of events"? What is "striking similarity" and how is it used when determining whether there was access?

2. What is the difference between the *factual copying* inquiry, and the question of whether that copying amounted to copyright *infringement*?

3. What is the difference between the "analytical" and "listening" tests? How is each used to prove substantial similarity? What are the challenges involved in applying them to musical works? How might they yield contradictory conclusions?

4. What is the role of the musicological expert in music copyright cases?

5. What is "de minimis" copying?

6. How has "fair use" been applied to music? List four examples—real or hypothetical—of reuses of music that you think should qualify for fair use.

CHAPTER 6

1. What is the rationale behind the subconscious copying theory?

2. If you were the judge in the three cases discussed in this chapter, how would you have ruled?

3. What evidence of access and similarity do you think is sufficient to support an inference of subconscious copying? Does this evidence overcome the assumptions discussed in the chapter about memory and authorship?

4. In general, do you think liability for subconscious copying is good or bad for music and for musicians? Putting you back in the position of music czar, if you were in charge of making the rules, would you change how it is applied?

CHAPTER 7

1. What do you think Anita, Barry, and Calandra would say about the outcome of this case? How would you tweak the infringement inquiry so that copyright fulfills its goal of promoting creativity?

2. What result do you think would best further Gaye's legacy?

3. You have now seen the actual expert analysis of music in a copyright case. If you were a member of the jury, how would you have ruled?

4. As we discussed in Chapter Two, music copyright was an outgrowth of literary copyright. What are some of the differences between comparing musical works and comparing literary works to determine whether there is infringement?

5. Some commentators have suggested creating a specialized system for music cases. For example, there could be an arbitration panel staffed by decisionmakers who have musical knowledge, or courts could hire independent experts to conduct the musicological analysis. What do you think of these proposals?

CHAPTER 8

1. Based on the cases covered in this chapter, list five musical building blocks that are not copyrightable and explain why. Now identify one feature from "Taurus," "Joyful Noise," and "Let's Get It On" respectively that, based on what you have learned, *is* copyrightable and explain why.

2. Building on the previous exercise, apply the law you have learned: choose a song that you like and name one aspect that is not copyrightable and free for all artists to use, and one aspect that is copyrightable and could form the basis of a copyright infringement claim.

3. The cases in Chapters Seven and Eight offered different ways of dealing with *combinations* of otherwise unprotectable musical material. The "Blurred Lines" case let the claim over the constellation stand and said in general that music is not subject only to thin copyright. The "Dark Horse" case said that the combination within the ostinato was not original, and the "Stairway to Heaven" case featured three different opinions on musical combinations. Review those opinions from the "Stairway to Heaven" case—if you were a judge on the en banc panel, would you join Judge McKeown's majority opinion, Judge Watford's concurrence, or the dissent from Judges Ikuta and Bea? Why? What approach best promotes musical creativity?

4. Would the "constellation" of similarities from the "Blurred Lines" case be protectable under the standard set by the a) "Stairway to Heaven" and b) "Dark Horse" cases? After reading the excerpts from those cases, do you think the "Blurred Lines" case would come out differently today?

5. Is it time to update the "access" inquiry for the music streaming era? If so, how?

CHAPTER 9

1. How did groups such as Public Enemy and De La Soul use samples in their music during the "golden age" of hip hop?

2. What were the competing textual interpretations in *Bridgeport* and *Salsoul* of the language in § 114(b) of the Copyright Act delineating the sound recording copyright? If you were a judge in another circuit having to choose between their approaches, which would you choose?

3. Evaluate whether the holdings of each of the three key cases you read about—*Grand Upright*, *Bridgeport*, and *Salsoul*—are consistent with the copyright law you learned about in previous chapters.

4. Artistically and ethically, do you think that sampling is different from other forms of musical borrowing? Think of the music you listen to—on the continuum from "creativity" to "theft," is there an example of sampling that you find highly creative, and another that seems more like free riding?

CHAPTER 10

1. What are two things that surprised you about the sample clearance process? As a class exercise, your instructor may ask you to compare your reactions with those of your classmates.

2. List three reasons why it can be difficult to obtain licenses for samples.

3. Choose and evaluate a solution that would compensate rights holders for the use of samples but also allow for the more efficient distribution of sample-based music.

4. If you were giving career advice to Barry, the remix artist, how would you tell him to source his samples and release his music? What trade-offs should he keep in mind?

5. Return to your role as Musicland's "music czar" from the book's Overture. Assume that Musicland has all of today's technology, but that people have just discovered sampling. You get to set up the rules that govern sampling, from scratch. After reading this chapter, you have the benefit of knowing all about how your neighboring country, the United States, has handled it so far. Remember that your goal is to encourage the production of lots of diverse music, and also to ensure that artists can make a living from composing, performing, and making new music. What would your system look like? What lessons from this chapter would inform your decisions? If your answer to question #3 is relevant to this answer, please incorporate it by reference and build upon it.

CHAPTER 11

1. Describe a key a) technological and b) legal transformation explored in this chapter.

2. What is secondary liability for copyright infringement? Why was the VCR legal, and why were the peer-to-peer file sharing services Napster and Grokster illegal?

3. What is the DMCA safe harbor and how does it apply to YouTube?

4. What is YouTube's Content ID system? What are some of the trade-offs presented by such automated content management systems?

5. What are the four exclusive rights that interactive streaming services such as Spotify need to clear?

CHAPTER 12

1. Describe one downside and one upside of the streaming era for musicians.

2. How does Spotify's algorithm predict what listeners want to hear? What are some of the costs and benefits of relying on algorithms and playlists for music discovery?

3. Provide either an optimistic or pessimistic assessment of TikTok's role in the music ecosystem.

4. Just as you did after Chapter Ten, return to this book's Overture, when you were invited to think about what you would do as the czar of the hypothetical Musicland. Instead of setting up the rules that govern sampling, you will be focusing on the era of streaming and generative AI that is discussed in this chapter. As with Musicland, you may still want abundant music, a diversity of styles, and a thriving musical marketplace. You have broad power to make changes to the law, the way music is supported, and even to business practices. Please list three changes that you would implement.

5. Music AI will have evolved – probably a lot – since this book was written. If you were writing a coda to the AI section that concludes this chapter, what updates would you highlight? At the moment that you are reading this book, what are the key opportunities and challenges presented by generative AI (or other technological developments) for the music ecosystem?

6. Does AI-generated music change your own conceptions of authorship and meaning in music?

7. Beyond AI, identify and discuss two additional developments from the world of music in any category—new platforms or changes to existing ones, new technologies, new genres and styles, or anything else that fits the themes we have covered. Have these changes affected the way music is created, discovered, or experienced? Have they altered the way music sounds?

CHAPTER 13

1. Choose four elements from the music produced by American slaves and identify a current song or songs that uses each of those elements.

2. Select three of the structural features of copyright law covered in this chapter and explain how they may have historically disadvantaged Black creators.

3. What kinds of exploitation were experienced by Bessie Smith, Chuck Berry, and Little Richard?

4. Turning to the question of when musical borrowing is acceptable and when it shades into appropriation, list one song that you think engages in permissible borrowing and one that engages in appropriation, and explain your reasoning.

5. What kinds of musical segregation were attempted during American history? How did music serve as a force for integration?

Glossaries

LEGAL TERMS

Blanket license: a license that applies across a collection of works rather than an individual work, such as the public performance licenses managed by ASCAP or BMI

Brief: a written document presenting legal arguments to the court.

Burden of proof: the obligation placed on a party to produce enough evidence to prove or disprove a claim.

Common law: the law established by courts through judicial decisions.

Compulsory license: a license that must be granted so long as certain criteria are met.

Concurring opinion: a separate opinion from a judge who agrees with the majority decision but wants to offer a different rationale.

Court of Appeals: in the federal court system, the court in each judicial circuit that reviews the decisions of district courts upon appeal.

Circuit split: when two or more Courts of Appeals provide different decisions on the same legal issue.

Damages: monetary compensation for the harm caused by another party's legal wrongdoing.

Defendant: the party who is being sued.

Dissenting opinion: a separate opinion from a judge who disagrees with the majority decision.

District court: in the federal court system, the trial court that first hears a case, determining the facts and applying the law.

En banc: a rehearing in exceptional circumstances by a larger panel of appellate judges; in some circuits this means all of the appellate judges and in other circuits there is a set number of judges.

Expert witness: a person with specialized knowledge whose testimony is intended to help the layperson understand the facts and issues in a case.

First Amendment: the amendment of the United States Constitution that prohibits laws that abridge the freedom of speech or of the press; it also protects other freedoms related to religion, assembly, and petitioning the government.

Injunction: a court order that compels a party to refrain from specified activities.

Judicial circuit: federal courts in the United States are divided geographically into twelve of these circuits, and there is also a thirteenth circuit that has nationwide jurisdiction over specialized issues such as patent law.

Judicial opinion: a court's written explanation of its decision in a case.

Jury verdict: a jury's decision in a case.

Liable: to be held legally responsible for an act.

Majority opinion: an opinion that is joined by more than half of the judges deciding a case; this is the opinion that becomes law.

Plaintiff: the party who brings a lawsuit.

Precedent: judicial decisions that are binding on courts deciding subsequent cases involving similar facts or legal issues.

Presumption: the assumption that certain facts are true until there is enough evidence to prove otherwise.

Settlement: a private agreement, often with confidential terms, that resolves a dispute.

Statute: the law enacted by a legislature, such as the Copyright Act.

Summary judgment: a judgment by a court in favor of one party without going to trial, when there are no factual disputes that require jury deliberation.

Supreme Court: the highest court in a jurisdiction.

Testimony: oral or written evidence given under oath.

Vacate: to set aside a prior judgment.

MUSIC BUSINESS TERMS

"Composition" or "song" rights: shorthand for the musical composition copyright.

Copyright Royalty Board or CRB: the government agency that sets rates for statutory licenses.

Digital Service Provider or DSP: a service that streams music such as Spotify, Amazon Music, or Apple Music.

Label: the recording company that owns the sound recording copyright. (The large record companies own many individual labels so it may be more accurate to call them "record companies," but since they are commonly referred to as "labels," this book employs that terminology.)

"Master" rights: shorthand for the sound recording copyright.

Mechanicals: shorthand for the license and accompanying royalties for mechanical reproductions of musical compositions (for records, CDs, downloads, interactive streams, etc.).

Mechanical Licensing Collective or MLC: the organization created by the Music Modernization Act to administer the new blanket mechanical license for on-demand streaming.

Music Modernization Act or MMA: the copyright law from 2018 that added a new blanket mechanical license for on-demand streaming and created uniform federal rules for pre-1972 sound recordings.

Performing Rights Organization or PRO: the organizations that administer blanket licenses for public performances of musical compositions, such as ASCAP, BMI, GMR, and SESAC.

Publisher: the publishing company that owns or administers the musical composition copyright. Traditional publishers offer more services but typically own the copyrights while publishing administrators offer fewer services but let songwriters keep their rights.

MUSICAL TERMS (AS USED IN LEGAL CASES)

Arpeggio: the sounding of notes in a chord one after another rather than simultaneously.

Chord: the sounding of a stack of two or more notes simultaneously.

Harmony: the sound when two or more notes are heard at the same time; in legal cases it generally refers to the selection of notes or chords that accompanies a melody.

Key: a scale or group of pitches that defines the tonality of a composition; keys can be "major" or "minor" and are named after the tonic (defined below), as with C major or B-flat minor.

Melody: successive musical notes, in various combinations of pitch and rhythm, that form the dominant tune of a song.

Note: a symbol used to represent a sound's pitch and duration on musical notation.

Ostinato: a melodic, rhythmic, or harmonic pattern that is repeated throughout a song or a portion of a song; courts have defined it as a "repeating instrumental figure."

Pitch: the "location" of a sound, usually thought of on a spectrum from high to low; for example the pitch that corresponds to the audio frequency 440 Hz is the note A above middle C.

Rhythm: the pattern of music in time; an arrangement of sounds (and sometimes silences) of different duration to form such a pattern.

Scale: an ascending or descending sequence of notes, often within a key or mode, beginning and ending on the tonic.

Syncopation: shifting or displacing a standard rhythm by accenting the offbeat.

Timbre: the quality of a sound that makes particular instruments or voices sound different when performing the same pitch (e.g. brassy versus stringy, twang versus warmth, etc.).

Tonic: the first note of a scale or the note upon which a key is based (e.g. the note “C” in the key of C major).

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CHAPTER 12

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CHAPTER 13

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About the Book

This is the open access, full-color, second edition of ***Music Copyright, Creativity, and Culture***, an introduction to the fascinating story of the legal, economic, aesthetic, and technological forces that shape the music we love. It can be read by anyone who is interested in that story or used as a textbook in classes ranging from undergraduate to law school. It is freely available to noncommercially share, copy, and even modify under a Creative Commons license and has no connection to Oxford University Press, which published the first edition. The book can be freely downloaded from web.law.duke.edu/cspd/musiccopyright/.

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